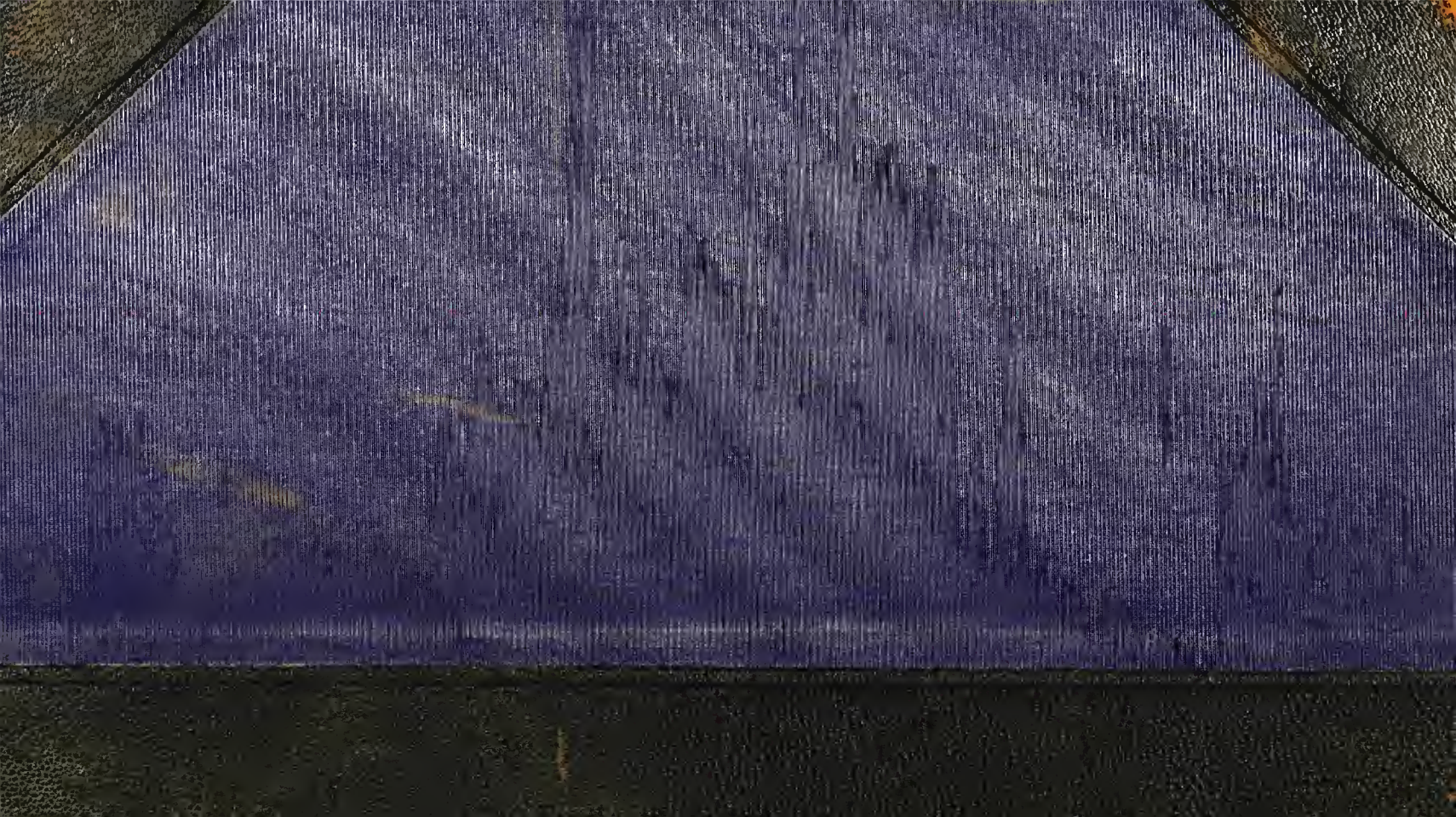

THE ALSOP CLAIM

The Counter Case of
The United States of America

FOR AND IN BEHALF OF THE
ORIGINAL AMERICAN CLAIMANTS IN THIS CASE
THEIR HEIRS, ASSIGNS, REPRESENTATIVES, AND DEVISEES

VERSUS

The Republic of Chile

BEFORE

HIS MAJESTY GEORGE V

OF THE UNITED KINGDOM OF GREAT BRITAIN AND IRELAND, AND OF THE BRITISH DOMINIONS BEYOND THE SEAS, KING, AND EMPEROR OF INDIA

Under the Protocol of December 1, 1909

WASHINGTON
GOVERNMENT PRINTING OFFICE
1910

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THE COUNTER CASE OF THE UNITED STATES.[a]

The protocol of December 1, 1909, negotiated by and between the Governments of the United States and Chile for the settlement of the Alsop Claim, provided, as to the case and the counter case of the two Governments, as follows:

> "The full case of each Government shall be submitted to His Britannic Majesty, and to the other Government, through its duly accredited representative at St. James, within six months from the date of this agreement; each Government shall then have four months in which to submit a counter case to His Britannic Majesty, and to the other Government as above provided, *which counter case shall contain only matters in defense of the other's case.*" (Case of the United States, p. 1.)

It will be observed from the language of the protocol, as quoted, that the "counter case shall contain only matters in defense of the other's case." The Government of the United States interprets and understands this stipulation to mean (1) that the counter case can raise no issues which have not been raised by the case to which it is an answer; (2) that the counter case of either party may not contain any further or additional evidence or arguments regarding points made in the case of that party, unless such point is specifically raised in the other's case to which the counter case is a reply; and (3) that if such further issues should be raised or such additional evidence or arguments should be offered, such issues, evidence, and arguments will not properly be subjects for consideration by His Majesty.

To the end that His Majesty may the more easily follow the contentions hereinafter made, the Government of the United States will adhere in its discussions to the order of the Chilean

[a] In the Counter Case of the United States, as in the Case, italics have, for the purpose of emphasis, been freely inserted in various copies of documents where italics do not appear in the original documents. It may also be observed that wherever in the following pages reference is made to the Appendix to the Counter Case of the United States, it is given as "Appendix, page —"; the Appendices of the Case of the United States being referred to as "Appendix —, Case of the United States."

Case, even though such a plan will, at times, involve some repetition of argument and a departure from what the United States would have deemed a more logical arrangement. The Government of the United States regrets, moreover, the necessity to observe that the failure of the Case of the Government of Chile, in the opinion of the United States, to state clearly and concisely the propositions of law upon which dependence is placed to establish the defense of the Government of Chile, coupled with seeming looseness and inaccuracy in statements of fact, has necessitated a more extended and voluminous discussion by the Government of the United States on the points raised by the Government of Chile than would have been otherwise required.

The Government of the United States also finds it necessary to observe and emphasize the fact that the Government of Chile has not, as a rule, produced for the inspection of His Majesty or for the inspection of the Government of the United States the various documents upon which the Government of Chile relies to substantiate her various allegations of fact. The adoption of such a course in this case must be regarded as particularly unfortunate in view of the fact that the documents in the possession of the United States appear to establish either that various of the allegations of the Government of Chile do not seem wholly in accord with the strict facts in the case, as understood by the United States, or that such allegations are framed with such looseness of expression as to facilitate an erroneous impression regarding the true conditions and circumstances to which they allude. The Government of the United States contends that except for matters of a general historical nature—such, for example, as might before an ordinary court be fairly said to be subject to the rule of judicial notice—no allegation of fact should be considered unless accompanied by the documentary evidence upon which it rests, since otherwise it might be that His Majesty would be under the necessity of considering, in connection with his study of the case, the inference of fact and the interpretation of documents which might be put forth by either of the parties in their respective cases, rather than the real facts or the actual documents themselves. The Government of the United States will point out, as the argument proceeds, the specific instances to which the above criticism is pertinent.

With these preliminary statements the Government of the United States has the honor to submit in reply to the Case of the Government of Chile THE COUNTER CASE OF THE UNITED STATES.

Impressed with the belief that such a course will be conducive to a more ready understanding of the arguments hereinafter advanced against the points made in the Case of the Government of Chile, there will be first considered as preliminary to the general discussion herein contained two matters which appear to be more or less fundamental to the Chilean Case.

These matters which it would seem from their presentation in the Case of Chile are regarded by the Government of Chile as more or less basic to the defense offered by that Government may be conveniently arranged under the following headings:

1. Parties for whom the United States is intervening.
2. The origin and character of the Alsop Claim.
   - (*a*) Character and reputation of the firm of Alsop & Co.
   - (*b*) Dealings between Pedro Lopez Gama and the Government of Bolivia.
   - (*c*) Dealings between Alsop & Co. and Pedro Lopez Gama.
   - (*d*) Statements of account between the concessionaires and the government.

I. Parties for Whom the United States is Intervening.

Chilean Case, Part I.—Introduction.

Statements of Chilean Case.

> "The present claim is made by the Government of the United States upon behalf of the firm of Alsop & Co. against the Government of Chile." (Opening sentence Chilean Case, p. 1.) "Before this Court [the American-Chilean Claims Commission of 1892] * * * there appeared also some of the partners of the firm of Alsop & Co., claiming from Chile the payment of their claims against Bolivia." (Chilean Case, p. 9.) "* * * Having regard to the terms of the aforesaid Judgment, it would appear superfluous to argue at length that the United States had no right to lend their diplomatic protection to the surviving partners of Alsop & Co." (Chilean Case, p. 10.) "* * * While noting, therefore, that the Government of the United States has in this case abandoned its own practice, in claiming to protect an alien firm, it is necessary, etc. * * *" (Chilean Case, p. 13.)

While these quotations will serve to indicate that the Government of Chile does not appear to be entirely certain in its own mind upon this point of the parties in whose behalf intervention has been exercised in this case, a consideration of the discussion which follows will show that at least the opening sentence of the Chilean Case as above quoted contains a fundamental inaccuracy, and this inaccuracy, which, notwithstanding the other statements made above, runs through the whole case destroys, if corrected, the force of a considerable part of the matters offered in defense by the Government of Chile. Without seeking to account for such inaccuracy, it may be remarked that the diplomatic negotiations which have for more than a quarter of a century been carried on between the two Governments would seem to render it perfectly evident that the Government of the United States began its diplomatic representations, and has continued them to the present time, not for and in behalf of the mere artificial entity of Alsop & Co., but specifically and definitely for and in behalf of the American citizens who organized this firm and who invested their own—that is, American—capital therein, and upon whom all the losses suffered as a result of the conduct of the Government of Chile fell.

It is true that the greater number of these American citizens, who in the twenties of the last century commenced and for fifty years continued their commercial operations in South America, have died during the period of almost thirty years which has elapsed since this Government began its representations in their behalf, but each and all of them left American citizens as their heirs and representatives, and it is for and in behalf of these, as well as for the surviving partners, that the final negotiations by the Government of the United States have been undertaken.

As indicated above, an examination of the correspondence in this case will show that the representations of the United States have always been based upon the fact that the firm of Alsop & Co., whatever its status may have been as a matter of mere legal fiction, was in essence and in fact wholly American, and that its members being American citizens, investing their own American capital, the Government of the United States had a right to make and to continue to make its representations in behalf of these American citizens, and for the protection of this American property, in respect to any and all actions which in the judgment of the Government of the United States were injurious and contrary to the law of nations.

This fact appears from the very earliest mention found in the diplomatic correspondence concerning the claim. In a dispatch of Minister Logan to the Secretary of State under date of August 9, 1883, the Minister, in response to the request of the Secretary of State for information concerning the "claims of American citizens against the Chilean Government, growing out of the present war," listed this Alsop Claim as that of "John Wheelwright for breaking of mining contract with Bolivian Government through Chilean occupation." (App. I, Case of the United States, p. 41.)

In the first specific instruction (dated March 20, 1886) given by the Department of State regarding this claim the Secretary of State stated that he transmitted to the American Legation at Santiago the "documents presenting and substantiating a claim of Mr. John Wheelwright, an American citizen now residing in Antofagasta, against the Chilian government for wrongs done him as partner of the firm of Alsop & Co." (App. I, Case of the United States, p. 47.) Later the claim came to be known as the claim of the "representatives of the late John Wheelwright" (Minister Egan to the Secretary of State, September 13, 1890, App. I, Case of the United States, p. 53), and this was the language used without objection on the part of the Chilean Government in a communication dated September 30, 1890, from the American

Minister at Santiago to the Minister of Foreign Relations of Chile. (App. I, Case of the United States, p. 56.) Two years later, under date of June 3, 1892, the American Minister, in addressing the Minister of Foreign Relations of Chile, referred to the claim as that of "the representatives of the United States Commercial House of Alsop and Company" (App. I, Case of the United States, p. 59), and the Minister of Foreign Relations, in his acknowledgment of this communication, likewise described the claim as that of the "representatives of the American Commercial House of Alsop and Company," without suggesting that the claim was any other or different than as described. (App. I, Case of the United States, p. 63.) Later in the same month—June 22, 1892—the American Minister, in another communication addressed to the Minister of Foreign Relations of Chile, again characterized the claim as that of the "representatives of the United States Commercial House of Alsop and Company" (App. I, Case of the United States, p. 64); and still later, under date of October 13, 1897, the Chilean Minister of Foreign Relations spoke of the "Alsop claimants" and likewise referred to the "Alsop claim." (App. I, Case of the United States, p. 70.) From that time until the present negotiations the claim has been referred to shortly as the "Alsop Claim" or, interchangeably, as the "Claim of Alsop & Co." The entire correspondence indicates, however, that these terms—"Alsop Claim" and the "Claim of Alsop & Co."—were mere designations and that it was at all times understood by both Governments that the Government of the United States was making its representations for and in behalf of the American citizens who comprised the firm of Alsop & Co. and who were interested in the claim itself. This is clearly apparent, for example, from the cable instructions sent by Secretary of State Hay to the American Minister at Santiago under date of June 9, 1904 (just prior, it will be observed, to the negotiation of the final treaty of peace between Chile and Bolivia), in which the American Minister was directed to "advise Chilean Government that the Government of the United States expects that just and reasonable indemnity be made in Alsop claim. *Some of claimants in great need.* The Government of the United States expects prompt and equitable payment *adequate to losses sustained by claimants.*" (App. I, Case of the United States, p 86.)

Moreover, the agent of the Government of Chile made a declaration before the United States and Chilean Claims Commissions of 1893 and 1894 which recognized that the real parties in interest in this claim were not the mere artificial entity of

Alsop & Co., but the American citizens who composed the firm. (App. II, Case of the United States, p. 407.)

But had there been any doubt as to the attitude of the American Government prior to the recent negotiations which immediately preceded the signing of the protocol of December 1, 1909, such doubt was wholly removed by the correspondence passing during the course of these negotiations and by the final protocol of submission of December 1, 1909. An examination of the protocol proposed by the Government of the United States through its Minister at Santiago, on September 17, 1909, will show that the preamble specifically and expressly set forth that the question to be submitted to arbitration was the question of the liability of Chile to recompense the American citizens, their heirs, assigns, representatives, and devisees, who had formerly constituted the firm of Alsop & Co. This preamble reads as follows:

> "Whereas the governments of the United States and Chile have not been able to reach an agreement as to the amount equitably due from Chile to Mr. John Wheelwright, Mr. George Frederick Hoppin, Mr. Joseph W. Alsop, Mr. Edward McCall, Mr. George J. Foster, Mr. Theodore W. Riley, Mr. Henry Chauncey, and Mr. Henry S. Prevost (their heirs, assigns, representatives, and devisees) American citizens doing business in Chile under the firm name of Alsop and Company." (App. I, Case of the United States, p. 184.)

It was pursuant to and in accordance with the position thus taken by the Government of the United States that there was incorporated in the protocol of submission of December 1, 1909, submitting the case to His Britannic Majesty as *amiable compositeur*, the following provisions:

> "Whereas the Government of the United States of America and the Government of the Republic of Chile have not been able to agree as to the amount equitably due the *claimants* in the *Alsop Claim;*
>
> Therefore, the two Governments have resolved to submit the whole controversy to His Britannic Majesty Edward VII who as an '*amiable compositeur*' shall determine what amount, if any, is * * * equitably due said *claimants*." (App. I, Case of the United States, p. 1.)

In the light of the correspondence which accompanied the negotiation of this protocol it is impossible to consider that the term "claimants in the Alsop claim" and the later phrase "what amount, if any, is * * * equitably due said claimants," had reference to or was intended to designate the mere artificial entity of Alsop & Co. On the contrary, it was intended to indicate,

what in words it does indicate, that the question to be determined in this case was the amount due the American claimants, the *persons* who were beneficially interested in the Alsop Claim.

Finally, it must be observed that the Case of the United States as formally submitted to His Majesty, demands indemnity, not for the artificial personality of Alsop & Co., but for the American claimants, their heirs, representatives, and devisees, who suffered loss by reason of the injuries inflicted upon them by the Government of Chile, the very title of the case as submitted being "The United States of America, for and in behalf of the original American claimants in this case, their heirs, assigns, representatives, and devisees, versus the Republic of Chile," and every point made by the Government of the United States in its Case, either expressly by name or by incorporation by reference, specifically sets forth that this intervention is for and in behalf of the claimants, American citizens.

It is believed, therefore, that even if the question were open to a fair doubt, as it is submitted it is not, still the correspondence passing between the two Governments upon this matter conclusively and undeniably establishes that the intervention in this case is for and in behalf of the American citizens (their heirs, devisees, assigns, and representatives) who composed the partnership of Alsop & Co., and who, operating under this firm name, invested in South America in the course of long years of honorable and extensive commercial enterprises hundreds of thousands of dollars of their own American capital, and as such American citizens so operating came into possession of the rights, titles, and interests for the protection of which (by compensation for their loss) the Government of the United States has submitted the present case praying for indemnity. The question of the right of the United States to intervene in behalf of its citizens, under the circumstances existing in this case, will be dealt with hereinafter (p. 70).

2. The Origin and Character of the Alsop Claim.

Chilean Case, Part II.—Historical Outline.

Statements of Chilean Case.

> "Further the circumstances in which Alsop & Co. acquired the interests which it is now sought to enforce against Chile, and the relations between Chile and Bolivia, and between them or either of them and the Company, are such as to deprive the present claim of any practical right to recognition by Chile, or of any right to recognition beyond the provision made for it in the above-mentioned treaty of the 20th October, 1904." (Chilean Case, p. 2.) "Reference is here made to the facts already stated with regard to the historical relations of Chile and Bolivia. These facts imply that the claim of Alsop & Co. had a doubtful legal origin, and was at all times of a highly speculative character. * * * Only Alsop & Co., the assignees of a claim of most doubtful origin. * * *" (Chilean Case, p. 47.) "A claim so old and so slightly recorded." (Chilean Case, p. 49.) "A claim so old and so nebulous in its origin." (Chilean Case, p. 51.)

In this passage, and others which will be hereinafter quoted in connection with this discussion, the Case of the Government of Chile employs, as will be noted, some very strong terms in connection with its characterization of the origin and nature of this claim—terms calculated to cast distrust upon the legality, the equity, and even the honesty of the various transactions upon which the claim rests, and therefore terms which should be used only and when a careful examination of the facts in the case seem to justify or demand their employment; and this conclusion appears to be particularly sound when it is considered that by making such charges against the claim itself there is also the necessity of implying the charge that the Government of the United States has intervened in behalf of and is pressing a claim of an unworthy character. It is repeated that nothing short of the very strongest proof, most carefully considered, could, it would seem, justify such an attitude. But a careful examination of the documents in this case convinces the Government of the United States that the claim is just, equitable, and honest in all of its parts and in all of its relations, and that in putting forth its

insinuations to the contrary the Government of Chile must have acted without a careful study of the case in its inception or without an attentive perusal of the documents upon which the claim is founded, since such examination and perusal would have convinced that Government that to cast distrust upon the origin of this claim could but be regarded, under all the circumstances of the case, as clearly unjustified.

So far as the legality of the Wheelwright contract of December 26, 1876, is concerned, it is believed that this matter has been already fully and, it is thought, sufficiently covered in the Case of the United States, one entire point being devoted to that phase of the claim (see Case of the United States, Point I, p. 44 et seq.) in which, it is submitted, it was clearly established that the contract upon which this claim is based is a valid and legal instrument, negotiated and concluded in strict accordance with Bolivian law.

This being true, the Government of the United States desires to observe that all questions regarding the origin and character of the claim prior to this contract are wholly and absolutely immaterial to the decision of the questions which have been submitted to His Majesty for determination and award. In support of this statement the Government of the United States desires to emphasize the fact that the present controversy has its origin in, and arises out of, and has to do entirely with the rights, titles, and interests held by the claimants in, by, through, and under the contract negotiated and concluded under date of December 26, 1876, by and between John Wheelwright, representing the claimants on the one part, and by the Government of Bolivia, through its duly accredited representative, on the other part; that this contract, as shown by its context, was negotiated after a full discussion of the matter between Wheelwright and the government officials; that, as stated above, it is a legal and binding instrument, negotiated and concluded in strict accordance with Bolivian law; that from the day of its signature until the present its legality and even equity have not only never been questioned but have always been recognized by the Government of Bolivia, which Government is in the best position to pass upon these matters; that its legality has heretofore invariably been recognized by the Government of Chile in her formal treaties and diplomatic correspondence; and that, finally, the Government of Chile, when approached upon this very phase of the matter by the Government of the United States, which desired to satisfy itself upon this point

before taking further diplomatic action, expressly declared that it had no evidence going to show that there was not due the claimants in equity all that the contract provided. (See Case of the United States, pp. 40, 41, 349.) In view of all of these facts and circumstances, and in view of the further fact that the suit in this case is based wholly upon the contract and the rights arising out of and connected therewith, and of the further fact that the Government of Chile nowhere suggests that there is not *some* equitable basis for the contract (though it does appear to doubt the extent in value of such basis), it is submitted that the only question before His Majesty is the question of the extent of the liability upon a contract the validity and binding effect of which is admitted, and that the Government of the United States is not, therefore, under any obligation in law or equity to defend the character of the antecedents of this claim, and that it might well dismiss this phase of the Chilean Case without further discussion.

Inasmuch, however, as prior to the making of the protocol of December 1, 1909, as well as since that date, the Government of the United States has given very careful consideration to this whole question of the origin and character of this claim, in order that it might be assured that it was not pressing for settlement any claim which was not founded in complete justice and equity, the Government of the United States is pleased, in order that His Majesty may understand, as fully as does the Government of the United States, that the Alsop Claim (as the records will show) is in all of its parts and ramifications just and equitable, and that it arises out of commercial transactions entirely honest and straightforward, the Government of the United States is pleased to submit a discussion of the matters hereinbefore indicated.

(*a*) THE CHARACTER AND REPUTATION OF THE FIRM OF ALSOP & CO.

According to the most reliable information obtainable, the house of Alsop & Co., of Valparaiso, Chile, and Lima, Peru, was established in the year 1820 by three American citizens—Richard Alsop, William S. Wetmore, and John Cryder. These men were very prominent in the commercial world. Mr. Richard Alsop, from whom the firm derived its name, came from a long line of shipping merchants, the name of Alsop having then for a century past been foremost among the shipping merchants of New England. The Alsops came over from Derbyshire, England, in 1635

and the family have ever since occupied a prominent position in the State of Connecticut, not only commercially, but socially and politically as well. Mr. Joseph W. Alsop, cousin of Richard, became a member of the firm in 1840 and continued as such until the liquidation of the partnership in 1873, so that he was one of the original claimants in the present case. Mr. Joseph W. Alsop was largely interested in railroading and was among the founders and promoters of what are now the great railroads of the United States and was for many years connected with the management of these lines. He maintained the same high standing that had been maintained by his ancestors before him and enjoyed practically an unlimited credit, both in the United States and in England.

Mr. Cryder, after looking after the affairs of the firm in South America for a number of years, retired and was succeeded by Mr. Henry Chauncey, of New York, father of one of the present claimants, Mr. Henry Chauncey, jr. Mr. Cryder, upon leaving South America, went to London, where he established the banking house of Morrison, Cryder & Co., which firm acted as bankers for Alsop & Co., of Valparaiso and Lima. This Mr. Morrison was the father of the late Charles Morrison, well known in financial circles in London, who recently died, leaving one of the largest fortunes ever left by a commoner in the United Kingdom. The firm of Morrison, Cryder & Co. was dissolved about the year 1841 and the business was taken up by George Peabody & Co., which firm was later succeeded by that of J. S. Morgan & Co., J. S. Morgan being the father of the present Mr. J. Pierpont Morgan, of New York.

Mr. Henry Chauncey, who succeeded to the interests of Mr. Cryder in the firm of Alsop & Co., also belonged to one of the oldest and most prominent New England families. He was a descendant of the Rev. Charles Chauncey, of Newplace and Yardley-Bury, Hertfordshire, England, who came to America in 1638 and later became the second president of Harvard College. Mr. Henry Chauncey was connected with many of the leading enterprises of his time. He was one of the promoters and founders of the Panama Railway, and since his death there has been erected on the line of this road a statue of the man whose zeal and enterprise made the completion of this undertaking possible.

During the fourth term of the copartnership of Alsop & Co. (1835–1840) the firm was composed of Richard Alsop, Henry Chauncey, Charles Bispham, and Edwin Bartlett. Mr. Bartlett

continued as a member of the firm for a period of twenty years. He served as consul of the United States to Peru from 1836 to 1841.

In the year 1840, the beginning of the fifth term of copartnership, a number of new partners were taken into the firm. These were Edward McCall and Stanhope Prevost, partners in the house of Edward McCall & Co., of Lima; George G. Hobson, a partner in the house of McCall & Co., Valparaiso; Matthew Biggs, clerk in the house of Alsop & Co., Lima; and Theodore W. Riley, agent of Alsop & Co. in Santiago. These new partners were American citizens, most of whom, prior to going to South America, had been, and after their return to the United States continued to be, prominent in commercial circles in this country. Mr. Stanhope Prevost and Mr. Edward McCall each served as consul of the United States at Lima, the former from 1843 to 1851 and the latter from 1851 to 1853. The Hon. John B. Prevost, father of Stanhope Prevost, was prominent in the early diplomatic history of the United States. He was commissioned as special agent of the United States to Chile and Peru in 1817, when those countries were struggling for their independence, and in addition he held numerous other offices of trust under his Government both at home and abroad.

As already indicated, Mr. Joseph W. Alsop also became a member of the firm in the year 1840. With a few exceptions the firm as thus constituted continued until the sixties. There were a number of changes in the managing partners in South America and Mr. Richard Alsop and Mr. Henry Chauncey, sr., had died, the present Mr. Henry Chauncey, who is the sole surviving partner, having become a member of the firm in the place of his father. In the ninth term of the copartnership Mr. George J. Foster, of New York, became an acting partner. Mr. Foster was a prominent New York merchant and enjoyed a high standing in the business world. After one term as managing partner he returned to New York and continued as a special partner until his death in 1876, after the liquidation of the firm was begun.

At the end of term ten (December 31, 1869) the Lima house was discontinued. Up to this time the houses at Valparaiso and Lima had been conducted under the same partnership agreements, the capital of the firm being distributed as the interests of the business required. The eleventh term began on January 1, 1870, to continue for a term of three years and provided for the operation of the Valparaiso house only. Mr. Stanhope Prevost having died during the last term, he was succeeded by his son, Henry S. Prevost, who acted for many years as liquidator of the firm, after the death

of John Wheelwright, and died at Lima, Peru, in 1904. Mr. John Wheelwright and Mr. George Frederick Hoppin were the acting partners during this term, and, as will appear from the Case of the United States, Mr. Wheelwright acted as liquidator of the firm after the expiration of the eleventh term.

Mr. Wheelwright came of one of the oldest of the New England families. He was a descendant of the eighth generation of the Rev. John Wheelwright, who founded Exeter, N. H., in 1638, and was famous in the colonial history of Massachusetts and New Hampshire. The Rev. John Wheelwright graduated at Cambridge, England, where he was a classmate and an intimate associate of Oliver Cromwell. The descendants of the Reverend Mr. Wheelwright became famous in the mercantile world. Foremost among these was the late William Wheelwright, whose name is so intimately connected with early steam navigation on the western coast of South America. He founded the Pacific Steam Navigation Company,[a] of London, and for many years superintended its operations. After more than twenty years' connection with this company he withdrew and turned his energies to the building of railroads in South America.

Alsop & Co., as the books will show, had considerable business dealings with William Wheelwright, and the latter's estate now appears among the creditors of the firm. It was during the latter years of Mr. Wheelwright's labors in South America that his nephew, John Wheelwright, went to Chile and became a partner in the firm of Alsop & Co. Though not so fortunate in his undertakings, John Wheelwright manifested many of the characteristics of his illus-

[a] The Pacific Steam Navigation Company, of which he was the founder, operated 54 steamers in 1876. He suggested in 1842, and afterwards built, a railroad from Santiago to Valparaiso. In 1849–1852 he constructed the railroad from the port of Caldera (which port he created) to Copiato, and in 1855 he planned a railway from Caldera across the Andes to Rosario, on the Parana, 934 miles. This was opened from Rosario to Cordoba, in Argentine Republic, in 1870, but its completion was postponed for years by the action of the Government, which rescinded its concessions on Wheelwright's refusal to negotiate a loan of $30,000,000, which he suspected was to be diverted to the construction of ironclads from its ostensible purpose of building the road. In 1872 he completed a railway 30 miles long from Buenos Aires to the harbor of Ensenada, on the Atlantic coast, whose great advantages as a port he had long urged. Wheelwright also constructed the first telegraph line, the first gas and water works, and the first iron pier in South America. He gave for benevolent purposes during his life about $600,000 and left one-ninth of his estate (about $100,000) to found a scientific school in Newburyport. His full-length portrait was placed in the Merchants' Exchange at Valparaiso by his friends, and a bronze statue of him has been erected by the board of trade in the same city.—Appleton's Cyclopedia of American Biography, Vol. VI, p. 457.

trious uncle. When, through unfortunate circumstances, the firm of Alsop & Co. was forced into liquidation Wheelwright, at great personal sacrifice, devoted himself to the arduous task of securing from the Bolivian Government the recognition of the rights of himself and his partners, and after accomplishing this recognition he devoted himself exclusively to the work of arranging for the operation of the mines granted to him. Without resources upon which to draw even for the bare necessities of life and without hope of reward beyond the satisfaction of recovering for his partners what, partly under his management, had been lost to them, Wheelwright, beset by all kinds of difficulties and embarrassments, spent the best years of his life in the desert of Atacama in a fruitless effort to obtain from the Government of Chile the rights of the American citizens whom he represented. He continued his fruitless endeavors until the day of his death in the year 1890. Wheelwright was known as a man of undoubted integrity, and no stronger testimony of the character of the man could be given than this singular devotion which, under such trying circumstances, he gave to the interests intrusted to his care.

The Government of the United States has gone thus into detail regarding the antecedents of the partners of Alsop & Co., for the character of a firm must be measured largely by the character of the men who compose it. Many of the facts set forth above are matters of history and may be verified by the genealogical records of New England; others are substantiated by the testimony of men now living who had personal acquaintance with the partners of Alsop & Co.

It will be observed that for more than fifty years the firm of Alsop & Co., maintaining houses at Valparaiso, in Chile, and at Lima, in Peru, had a continuous existence. During this period the firm enjoyed an enviable position among the commercial houses on the western coast of South America. Its reputation for honest and fair dealings secured for it the very best connections in the United States and in London, as well as in South America. It numbered among its London connections such firms as J. S. Morgan & Co., Baring Brothers, and H. Kendall & Sons. Wherever the firm's name was known it was honored and respected and its credit in the commercial world was of the very best.

The firm was essentially American. The capital partners, who directed the policy of the house, resided for the most part in the United States. As already pointed out, all of the terms, excepting

the last, provided for houses both in Lima, Peru, and Valparaiso, Chile, so that the firm was as much Peruvian as it was Chilean. For many years the firm also maintained a house in San Francisco, California, and carried on extensive business operations in the United States.

In the face of these facts, it is unnecessary to attempt any characterization of any insinuation made in the Case of the Government of Chile that the firm of Alsop & Co. were "foreign adventurers" operating in the Bolivian Littoral, "so that the claim of Bolivia to the disputed area should be recognized and asserted by the country to which the concessionaries respectively belonged" and such an insinuation appears wholly groundless when it is considered that it was not until nearly a decade after the granting of the guano concessions to the "foreign adventurers" in question did Alsop & Co. acquire the interest which constitutes the antecedent of the present claim.

(*b*) DEALINGS BETWEEN PEDRO LOPEZ GAMA AND THE GOVERNMENT OF BOLIVIA.

So far as the dealings between Gama and the Bolivian Government may be gathered from the records now in the possession of that Government (and a careful search has been made with a view to obtaining all the records which that Government possesses) it would appear that the following narration accurately summarizes the various contracts made by and between Gama and the Bolivian Government for the exportation of guano:

The Ossa contract.—The operations of Don Pedro Lopez Gama, out of which this claim arose, began in 1858, when the authorities of the Bolivian Government, unwilling or unable to continue the exportation of guano under the direction of the contractor Latrile, who paid the Government 8 pesos for good guano and 5 pesos 4 reals for inferior guano (Appendix, p. 304), called for other proposals for guano exportation. As a result of this call, two parties, Pedro Lopez Gama, a native of Brazil, and José Santos Ossa, a native of the Republic of Chile, each proposed a contract under which he was willing to undertake the exploitation of the guano. (Appendix, pp. 305, 307.) Neither proposal having been accepted in the first instance, Ossa amended his proposal, and to him the contract was awarded under date of July 21, 1858. (Appendix, p. 309.) Under this contract Ossa was to export 30,000 tons of guano within eight years, for which he was to pay 8 pesos 4 reals for each registered

ton of guano from the islands and 5 pesos 6 reals for each registered ton of guano from other places. Ossa also agreed to advance to the Government 50,000 pesos, 20,000 upon the signature of the instrument and the balance in three equal monthly installments. (Appendix, p. 308.) This money seems to have been paid by Ossa. (Appendix, p. 311.)

On August 28, 1860, Ossa assigned this contract to Pedro Lopez Gama, receiving therefor 70,000 pesos, 30,000 of which were paid down upon the signing of the instrument, it being stipulated that "for the remaining 40,000 pesos he [Gama] will deliver on the signature of this instrument a bill in favor of Don José Santos Ossa, payable in Valparaiso at the house of Alsop & Co. six months from the date of this document." (Appendix, p. 314.) Ossa acknowledged in a formal instrument the receipt of this money. (Appendix, p. 316.) It thus appears that Alsop & Co. were associated with Gama as his financial supporters and bankers from Gama's very earliest guano contracts.

The Government of Bolivia recognized this transfer of the Ossa contract under date of December 24, 1860. (Appendix, p. 319.)

The documents show that Gama performed this contract in strict accordance with its terms and that upon the termination of the contract it was duly canceled, Gama having in the meantime paid to the Government of Bolivia the Government's royalty upon the 30,000 tons of guano which were exported under the contract. (Appendix, p. 321.)

Gama's contract of 1862.—On April 1, 1862, Gama proposed to the Government of Bolivia the making of a second contract, providing for the exportation within eight years of another 30,000 tons of guano for which he should pay to the State the same price—that is, 8 pesos 4 reals for each registered ton, if island guano, and 5 pesos 6 reals for each registered ton from other places. The contract also provided that the contractor should advance to the Government the sum of 60,000 pesos on account current at 12 per cent interest; that during the life of the contract it should be exclusive with reference to the exploitation and exportation of guano from the Bolivian coast; and that the contractor should have preference in continuing the exportation of guano which might be left in the guano fields of Bolivia after the expiration of the contract. (Appendix, p. 323.) This offer was duly accepted by the Government of Bolivia under date of April 15, 1862 (Appendix, p. 324).

Early in October of 1862 two parties, Mattias Torres and Juan Lopez, alleging that they were the possessors of concessions from the Chilean Government, interfered with the operations of Gama in the exploitation of guano in the territory of Mejillones, apparently the situs of the richest, if not the only, deposits of guano that could be commercially operated upon the Bolivian coast, with the result that the attorneys of Gama filed suit in the court of Lamar asking for a writ of ejectment against said parties on the ground that they were interfering with Gama's concessionary rights. After notice given and an opportunity for filing evidence, the court declared Don Pedro Lopez Gama to be entitled to protection in the exclusive right to the possession of the Mejillones guano fields, and an order was issued to put Gama into possession. Torres and Lopez refused to obey the mandate of the court and the judge brought the matter to the attention of the Central Government. The situation was complicated by the fact that Torres had hoisted the Chilean flag on Mejillones on the theory that it was Chilean territory. In referring to the action of the Chilean citizens implicated, as well as to the action of the Government of Chile itself, the Minister of Foreign Relations of Bolivia asserted that the Government of Chile was responsible "for the damage and injuries that so violent a despoliation occasions Bolivia, as well as for those that are for the same reason suffered by the Brazilian subject, Don Pedro Lopez Gama, the contractor with the Bolivian Government for the exploitation of the guano of its Littoral and protected in the possession thereof by the tribunals of the Republic." (Appendix, p. 334.) It would seem that the action of Chile taken at this time in response to the representations of the Bolivian Government was largely confined to representations that the assessments against Torres for damages was excessive and that such damages should therefore be reduced. (Appendix, p. 337.)

It will thus be observed that there was precipitated, very early in the history of Gama's operation of the Bolivian guano fields, a contest with persons alleging that they possessed rights from the Government of Chile; and, further, that at the time of these occurrences which interfered so detrimentally with Gama's operations the Government of Bolivia was in full possession and control of the territory and deposits in question, and that it was not for four years after this that the treaty of 1866 was negotiated, which treaty seems to have been the first formal recognition by Bolivia that Chile had any colorable claim to any of the Littoral. It should also be observed that by this contract Gama was in no

sense whatever a gratuitous grantee of a guano concession, but that, on the contrary, he was to pay and did pay to the Government of Bolivia in this case, as under the Ossa concession, a substantial royalty for every ton which he exported.

Gama's contract of 1866.—Under date of April 1, 1866, Gama proposed to the Government of Bolivia the making of another contract for the exploitation of guano. This contract provided for the exportation of 100,000 tons during a term of twenty years, for which Gama was to pay the same price as that named in his other contracts. Gama also agreed to advance to the Government 100,000 pesos, to be paid by three bills of exchange, one for 40,000 and two for 30,000 each. As will hereafter appear, these bills were duly drawn and were paid by Alsop & Co. (See p. 29, *infra.*) This contract was accepted by the Government under date of April 15, 1866, and on the same date it was ratified by Gama. (Appendix, p. 344.) Four months and a half after the making of this contract with Gama the Minister of Bolivia at Santiago and an officer of the Chilean Government, although fully aware of Gama's concession, made another contract for the exploitation of guano from Mejillones, a part of the territory included in the Gama concession, this second contract being given to one Reviere for and on account of Señor Lucian Arman. Against this contract Gama protested, first under date of September 20, 1866 (Appendix, p. 347), and second under date of July 18, 1867 (Appendix, p. 351), in each case pointing out that the contract interfered with his rights, was detrimental to his interests, and inflicted upon him serious injuries.

Modified contract of 1867.—As a result of Gama's protests, Don Mariano Donato Muñoz, the Bolivian Minister of State, who had been authorized to make "whatever arrangements he found suitable in all branches of public administration" (Appendix, p. 352), made with Gama under date of July 24, 1867, a modified contract consigning to Gama, "*as indemnification for whatever damages he may have suffered and may suffer as a result of the contract of Messrs. Arman & Co., and others that the Supreme Government may accept in the future respecting the guano deposits of Mejillones,*" *the extraction and exportation of 50,000 tons, by register, of guano.* (Appendix, p. 349.)

It will thus be observed that this 50,000 tons (which forms part of the final account between Gama and Bolivia) can in no sense be regarded as a "concession to himself [Gama], apparently gratuitous" (Chilean Case, p. 4), since it was expressly granted to cover

damages which Gama had suffered or would suffer by reason of the Arman contract, which gave to Arman, in derogation of Gama's earlier and *exclusive* rights, the *exclusive* right to exploit Mejillones guano fields, which, as subsequent events showed, were the richest and practically the only fields upon the Bolivian coast.

Gama's contract of August, 1867.—After the making of this supplemental contract of July, 1867—that is, on August 2 of that year—Minister Muñoz addressed a further communication to Gama, inviting Gama to enter into and conclude a contract for a loan of 100,000 pesos, upon the "basis and under the conditions which you shall deem compatible with your interest and those of the treasury." To this proposal Gama replied, under date of August 3, 1867, and proposed to advance to the Government of Bolivia 50,000 pesos, which should be a charge upon the customs of the port of Cobija. Gama also stated in the same communication that it was an "established fact, notorious and undeniable, that, employing all the efforts of which a man is capable, exhausting my resources and without sparing any sacrifice, I have labored for more than nine years searching for guano beds on the Bolivian Littoral, organizing and systematizing their exploitation before anyone else thought of it, so that it may be affirmed without exaggeration that I have created this new and fruitful source of wealth, and by assuring to the treasury effective and considerable income I have contributed on a large scale to the development of the industry and to the best interests of the Republic" (Appendix, p. 357), and proposed that the Government therefore grant to him an exclusive right for thirty years, with the right of renewal for thirty years, to export all the guano which might be discovered in the Littoral outside of the territory adjudged to Arman, Gama undertaking to make at his own expense the necessary explorations and with all necessary machinery, workmen, and equipment. He also proposed that the Government grant to him free of export 150,000 registered tons to be exported from the Bolivian Littoral, outside of the Arman area, with the provision that if he found no guano outside of this area then he should be entitled to exploit Mejillones at the conclusion of the Arman contract. This offer in a modified form was accepted by Minister Muñoz, who granted an exclusive right as to exportations north and south of Mejillones for a period of thirty years, and also granted to him (Gama) the right to export 100,000 registered tons of guano free of duty as a measure of indemnification for his

services of exploration, which were to be undertaken in accordance with Gama's offer. This 100,000 tons was specifically granted without prejudice to the concession in "my [Muñoz's] resolution of the 19th of the month last past." (Appendix, p. 360.) This contract was accepted by both parties and the 50,000 pesos were furnished to the Bolivian Government, the receipt thereof being duly acknowledged. (Appendix, p. 362.)

Upon the meeting of the Constituent Assembly of Bolivia in September, 1868, a decree was passed approving "all the acts of the dictatorial administration * * * from December 28, 1864, and the sanction of the provisory statutes of August 6 last past." The records show that Gama began and concluded his explorations as provided in his contract, with the result that he found no guano to the south of Mejillones. (Appendix, p. 365.) It will be observed, therefore, that the 100,000 registered tons granted under this contract, which comprises the balance of the so-called "gratuitous" concession of the Bolivian Government to Gama, was based, first, upon his past services to the Government of Bolivia in the matter of guano exploitations, and particularly as compensation for the expense, which was considerable, to which Gama had been put by reason of his explorations for new guano beds outside of the Mejillones district, and it was so regarded by the Bolivian authorities, as is shown by the fact that in confirming both this contract and the contract of July 24, 1867, the Minister of Finance, in notifying the Prefect of Cobija of the approval of the actions of Minister Muñoz upon the coast, specifically mentioned the concession or privilege of "indemnity which he has granted to the laborious and old contractor for the exploitation of the guano deposits of our coasts, Don Pedro Lopez Gama." (Appendix, p. 364.)

Matters were in this shape when Arman, unable to carry out his contract, attempted to assign the same to Reviere, his former agent. The assignment was not, however, recognized by the Government of Chile. (Appendix, p. 366.) Under the stipulations of Gama's contracts, the Arman contract now being out of the way, Gama became entitled (under his contracts of 1867) to undertake the exploitation of the Mejillones deposits under and pursuant to the terms of his agreement. The Government of Chile, however, immediately undertook, although aware of Gama's rights, to negotiate a contract for the exploitation of Mejillones guano with one Henry Meiggs, a citizen of the United States, with the result that under date of December 5, 1868, the Minister of

Finance of Chile, together with the Bolivian Minister at Santiago, signed a contract with Mr. Meiggs, which was in due course submitted by the attorney for Meiggs to the Bolivian Government for approval and ratification.

Immediately upon receiving notice of this new contract Lopez Gama filed with the President of the Republic of Bolivia a protest against the negotiation of the contract and proposed, in connection with his protest, that inasmuch as he now had a prior right to the guano at Mejillones he be permitted either to extract his 150,000 tons of guano before the Meiggs contract became effective, or that he "might undertake the exploitation simultaneously with Meiggs's operations." As a result of this protest and the correspondence which attended and followed it, the Minister of Finance of Bolivia ratified the Meiggs contract with the understanding that the "Government of Bolivia being obligated to Señor Pedro Lopez Gama to allow him the exploitation and exportation of guanos in the amount of 150,000 registered tons, grants him the right of exploiting them in the area of Mejillones without injury to the contract of Señor Meiggs, the Government of Bolivia recognizing the right of that of Chile in compensation thereof to dispose freely of an equal number of registered tons without other condition than that of notification." This contract, with the condition attached, was accepted by both the attorney for Meiggs and by Gama. It will thus be observed that there were now added to the injuries already sustained by him the loss of his 1866 contract, together with whatever was due on the 1862 contract, there being recognized as remaining in Gama merely the rights which he possessed with reference to the 150,000 registered tons to be exported free of duty. It should also not be lost sight of that the advances of over 200,000 pesos made by Gama to Bolivia appear never to have been repaid, excepting a part of the first advance of 60,000 pesos. In the face of these facts it is unnecessary to point out how little such a right as that given by Bolivia to Gama resembles a gratuity.

Gama's agreement of 1870.—Difficulty having arisen regarding the mining of the 150,000 registered tons of guano under the agreement as above set forth, Gama, under date of the 26th of October, 1870, at a conference with the Minister of Bolivia in Chile made an agreement with the Minister that in place of the 200,000 tons of guano to which he had a right under the various contracts above named he should receive Bolivia's share of the

proceeds from 400,000 tons of guano which were to be sold at public auction in Santiago on May 1, 1871, for the joint account of Bolivia and Chile.

It appears, however, that before the date of the sale of the 400,000 tons of guano a revolution took place in Bolivia which resulted in the overthrow of the Melgarejo administration. The new administration was inclined to disregard certain administrative acts of the old, and for this reason Gama presented memorials to the Minister of Finance and to the Assembly which met in 1871, asking for the recognition of his rights. The assignment of the 200,000 tons corresponding to Bolivia's share of the 400,000 tons which were in due course sold at Santiago was not recognized either by the Government of Chile or of Bolivia, but as a result of reports by the committees of the Ministry of Finance and Industry the Bolivian Legislature, on November 24, 1872, passed a decree by virtue of which the Cabinet Council, under date of December 21, 1872, passed a resolution recognizing in Gama the right to 150,000 registered tons of guano, the value of which was stipulated to be 1,087,500 pesos. (App. I, Case of the United States, p. 305.) This right was reaffirmed by the Bolivian Government under dates of December 18, 1875 (App. I, Case of the United States, p. 333); January 22, 1876 (App. I, Case of the United States, p. 335); February 7, 1876 (App. I, Case of the United States, p. 337). On the 9th of April, 1875, Gama assigned his rights against the Bolivian Government to the liquidating partners of Alsop & Co. (App. I, Case of the United States, p. 326), the legality of this transfer being recognized in the executive resolution of February 7, 1876, *supra*.

The general course of the transactions between Gama and the Bolivian Government have recently been epitomized in the memoria of the Bolivian Minister of Foreign Relations to the Bolivian Congress of the present year (1910), the report reading as follows:

> "Toward the close of the last year an international difficulty arose between the United States of America and the Republic of Chile on account of the claim made by the former Power demanding a cancellation of the Alsop credit.
>
> "The Republic of Chile finding itself in possession of the territory included between the twenty-third parallel and the place where the River Loa empties into the Pacific, in which lie the real properties connected with the debt, and the treaty of October 20, 1904, being in force, Bolivia is in fact eliminated from the question.
>
> "Nevertheless, the department of which I have charge has believed that it was its duty as a matter of the greatest precau-

tion to carefully study the affair and to give to its diplomatic agents some instructions in regard thereto; and in order that the honorable Congress may form its judgment, I am going to make a cursory statement which will show the absolute freedom from liability of Bolivia.

"On October 13, 1860, Don Pedro Lopez Gama, a Brazilian citizen and a partner of the North American firm of Alsop & Co., who had established a domicile in Valparaiso, acquired by a public instrument of the same date the rights of the concessionaire of Bolivia, Don José Santos Ossa, for the exploitation and exportation of 30,000 tons of guano from the coast of the Republic.

"In 1862 the contract for the same number of tons was renewed, 60,000 pesos, at an annual interest of 12 per cent, being advanced to Bolivia. On April 28, 1866, another contract was entered into with the same party for the exploitation of 100,000 tons of guano, the concessionaire making an advance of 100,000 pesos, at an interest of 9 per cent per annum.

"Difficulties produced by the Chilean Government and the Arman and Meiggs contract prevented said exploitation from being carried into effect and gave rise to the issuance of the decrees of February 15, 1869, and December 21, 1872, acknowledging in Don Pedro Lopez Gama a right to the value of 150,000 standard tons of guano, which at the rate of 7 pesos 2 reals per ton amounted in all to 1,087,500 pesos, payable by 25 per cent of the net proceeds which the State derived from the exploitation of its estaca mines in Caracoles.

"On April 1, 1873, the board of auctioneers (Juenta de Almonedas) accepted the proposal of Don Pedro Lopez Gama for the working and exploitation of the estaca mines of the Littoral of the Republic. The concessionaire offered as a guaranty of the fulfillment of his obligation the credit which the Government of Bolivia had recognized as due him out of the product of these mines, and besides a loan of 1,250,000 pesos at 8 per cent per annum, 6 per cent amortization and 1 per cent commission, which was not carried into effect.

"There arose a misunderstanding between the Government and Don Pedro Lopez Gama concerning the determination of the estacas subject to exploitation; a misunderstanding which was submitted to arbitration and decided against the Government, which ended by declaring that it could not fulfill the award because of possible international complications. As a consequence of this act Lopez Gama publicly transferred his rights to the house of Alsop & Co.

"It was then that John Wheelwright, a representative of this firm, began to urge the recognition of the credit, until finally by a resolution of December 24, 1876, issued by the Minister of Hacienda, and accepted by Wheelwright, there was acknowledged due the claimant from the principal, 835,000 bolivianos *with interest at the rate of 5 per cent per anunm not compoundable* running from the date of the execution of the contract. There was allotted to the cancellation of this credit the products of the estaca silver mines of the State in the Littoral of the Republic.

"Such resolution, reduced to a public instrument of compromise two days later, constitutes the basis of the debt. Therefore, every liquidation of the Alsop credit must be made beginning with the date of the resolution so often cited.

"The payment of the Alsop credit was the object of various negotiations between Bolivia and Chile, among which should be mentioned the protocol of May, 1891; the treaty of peace of 1895, which was not perfected; the protocol of May 26 of the same year; the protocol of 1896, in which its amount was estimated at 835,000 bolivianos of 20 pence, or, say, 954,285 Chilean pesos; the treaty of peace of October 20, 1894, and the notes exchanged (notas reversales) on the 21st of the same month and year.

"The North American Government, considering with justice that Chile as the possessor of the territory in which the estaca mines are located, was the one on whom the payment of the credit rested, began its claim for the cancellation thereof as early as the year 1884, and in 1888 gave a formal character to its demands. In 1892 it demanded the prompt liquidation and cancellation of the credit and in the same year the North American and Chilean Governments agreed to submit the matter to a claims commission. The commission lapsed for various reasons. It was constituted anew in 1897 and on March 12,1900, the litigant nations concluded a protocol by virtue of which the Alsop question was submitted to the jurisdiction of an arbitral tribunal which was to meet in Washington and which declared itself incompetent to take jurisdiction of it.

"The treaty of peace, October 20, 1904, having been signed, the North American Government began anew the negotiations in December of the same year and followed them on in 1907, 1908, and 1909, in which year the question assumed a very serious character until the idea of submitting it to the arbitration of the King of Great Britain opened the way which has been the course adopted by the litigants.

"On that account the Governments of the United States and Chile issued to their legations accredited abroad a circular explanation. In that of the North American State Department it is easily seen that it recognizes that we are not bound to pay the credit in question, and that it has considered Chile as the only debtor.

"Our adjustments with Chile are very explicit in the same sense.

"The Alsop credit constitutes a real right since there are pledged to its payment the estaca mines of Caracoles by virtue of a series of solemn contracts. That of December 24, 1876, was concluded when Bolivia exercised complete sovereignty over the territory of the Littoral and the treaty of 1866 was then in force by virtue of which the Government of Chile recognized our sovereignty as far as parallel 24 of south latitude.

"Therefore the properties which constituted said guaranties are subject and were subject to the demand of the credit, and the state which possesses them, as an annexing party, has recognized in public treaties its obligation to stand the incumbrances

of the annexed territory, in accordance with the principles of international law.

"The question having been submitted to the arbitration of the Government of the United Kingdom of Great Britain, the Envoy Extraordinary and Minister Plenipotentiary of Bolivia at the Court of St. James, Dr. Ismael Montes, has been instructed to follow closely the suit without intervening therein, with the purpose of ascertaining the proceedings and the arguments of the parties engaged in the litigation, for the purpose of taking precaution against and avoiding any act tending to compromise Bolivia.

Aside from the fact that there is in this résumé of the Alsop transaction no mention whatever of the appropriation of the Arica customs receipts to the payment of this obligation under the Wheelwright contract of 1876, it will be observed that this narration of facts completely supports that which has already been made above.

It will thus appear, from this account of the various transactions concerned, that the dealings between Gama and the Bolivian Government were perfectly clear and well defined; that the Government of Chile had ample and formal notice of most, if not all, of such dealings; that the contracts under which these dealings were carried on are public and readily accessible to anyone desiring to investigate the matter, and therefore that the Government of Chile might have secured information even if it did not already possess it; and that there is absolutely nothing in the record justifying the statement that Gama's claims were, as charged, either "doubtful in their origin" or "highly speculative in their character" or "nebulous." Moreover, it will appear that the relationship between Gama and the Supreme Government of Bolivia was a relationship which continued for upward of fifteen years, and a relationship which resulted greatly to the material prosperity and advancement of the Government of Bolivia by enabling the latter to establish on a firm basis the guano industry, thus opening up for that Government a source of untold wealth. The records also show that Gama's operations in the guano fields were the subject of repeated interruptions and the bases of large losses, many times repeated, because of the attitude (in effect unfriendly to Gama, whatever may have been the real intention) which the Government of Chile adopted toward the concessions granted by the Government of Bolivia; that such losses were of a character and extent to afford ample consideration for all concessions granted by Bolivia to Gama; and finally, that since such losses resulted largely from

actions of Chile in connection with the granting of rival concessions, that Government may hardly be now heard to say that the compensation granted by Bolivia for such losses was not a proper adjustment of these difficulties.

(*c*) DEALINGS BETWEEN ALSOP & CO. AND PEDRO LOPEZ GAMA.

As shown in the narration above given of the dealings between Gama and the Bolivian Government, the financial relationship between Gama and Alsop & Co. began coincidently with the relationship between Gama and the Bolivian Government in the matter of guano contracts. It will be recalled that in the instrument in which Ossa assigned his contract to Gama it was stipulated that "for the remaining 40,000 pesos, he [Gama] will deliver, on the signature of this instrument, a bill in favor of Don José Santos Ossa, payable in Valparaiso, at the house of Alsop & Co., six months from the date of this document." This was on August 28, 1860.

In a contract dated June 27, 1862 (Appendix, p. 40), Alsop & Co. agreed with Gama to advance to the latter the funds necessary for the carrying out of his arrangements with Bolivia in connection with the exploitation of guano and to supply the money to be advanced by Gama to Bolivia. These advances on the part of Alsop & Co. to Gama continued throughout all of the operations of Gama in the Bolivian littoral and were secured by three written instruments of transfer, or assignments, the first dated June 25, 1862, assigning to Alsop & Co. all the rights possessed by Gama under the Ossa concession of 1858, and likewise all the rights possessed by him under the renewal contract of 1862 for the exportation of an additional 30,000 tons of guano. (Appendix, p. 42.) The second instrument, dated August 24, 1866, assigned to Alsop & Co. the contract between Gama and the Bolivian Government of the 5th of April, 1866, by which Gama is granted the right to export 100,000 tons of guano, the consideration for this assignment being stated in the written instrument as follows:

> "That Señor Don Pedro Lopez Gama having obtained the exclusive privilege of exporting guano from Bolivia for twenty years by virtue of an *advance payment* to the Government of Bolivia of $100,000 Bolivian money or its equivalent, $80,273.43 Chilean money, at the stipulated rate of exchange, which sum has been disbursed on the account of Señor Don Pedro Lopez Gama by the Messrs. Alsop & Co., it is agreed that the said contract shall be transferred to the said firm in guaranty of the

> said advance payment and of such other sums as have been or shall be disbursed by the Messrs. Alsop & Co. * * *
>
> "Alsop & Co. agree to supply the funds necessary for the purchase of provisions, payment of the laborers, expenses of administration," etc. * * * (Appendix, p. 62.)

The third instrument of transfer is dated December 24, 1868, and by it the parties ratify and reaffirm all that is stipulated in the two instruments of transfer just mentioned, and in addition Gama assigns to Alsop & Co. the two contracts celebrated with the Government of Bolivia in the months of July and August, 1867, granting Gama the right to exploit free of duty 150,000 tons of guano. (Appendix p. 66.)

An examination of these instruments will show that Alsop & Co. in fact supplied Gama with the funds necessary to cover the special advances to the Government of Bolivia, and it would seem that in addition thereto they also supplied all the funds necessary for the exploitation, loading, and shipping of the guano—in short, that Alsop & Co. financed Gama in all his operations in the Bolivian Littoral in connection with the exportation of guano, including the funds necessary for the administration of the business, the purchase of machinery, the hire of laborers, etc., and, in addition, funds sufficient to cover the chartering of ships, the insuring of cargoes, etc. This fact is brought out in Gama's memorial to the Bolivian Assembly of 1871, where he says:

> "As in this business I had to compromise the capital of three bankers of the United States [apparently referring either to the three houses of Alsop & Co., Valparaiso, Lima, and San Francisco, or to the three terms of the Valparaiso partnership] with whom I arranged beforehand so as to extend the business, I wished, on their indication, to assure myself better in my rights. * * *
>
> "With such a solemn contract, I thought that the capital, *mine and foreign*, which was to be invested in this business was superabundantly guaranteed; and then I ordered two steam engines of an exorbitant price for operating in the excavations, and besides 14 frigates of considerable tonnage for the transport of the guano to Europe." (Appendix p. 181.)

As has already been shown, the firm of Alsop & Co. was carried on by successive partnerships, there having been in all eleven of these partnership terms. The Gama account was opened during the ninth term (1860–1865) and was continued during the successive terms ten and eleven. Owing to the length of time that has elapsed since the closing of the account in 1875 and to the fact that all of the managing partners of the firm have been dead for many

years, it has been impossible for the Government of the United States to locate all the Alsop books of account containing the details of the Gama transactions during terms nine and ten. There are, however, documents of a perfectly authentic nature to show beyond the possibility of a doubt that the account rendered between Gama and Alsop & Co. in 1875 was accurate in all its details. This account was as follows:

Pedro Lopez Gama, esq., to Alsop & Co. in liquidation, Dr.

1871.			
Dec.	31.	To balance of accounts on this date as follows:	
		Special account	$70, 141. 16
		Advance account	95, 156. 80
		General account	640, 349. 15
			$805, 647. 11
1872.			
Dec.	31.	One year's interest, at 10 per cent per annum	80, 564. 71
			$886, 211. 82
1873.			
Dec.	31.	One year's interest, at 10 per cent per annum	88, 621. 18
			$974, 833. 00
1874.			
Dec.	31.	One year's interest, at 10 per cent per annum	97, 483. 30
			$1, 072, 316. 30
1875.			
Apr.	7.	3 7/30 months' interest, at 10 per cent	28, 893. 96
			$1, 101, 210. 26
1875.			
Apr.	7.	Balance on this date of the special account	186, 385. 50
			$1, 287. 595. 76

Say cash on this date one million two hundred and eighty-seven thousand five hundred and ninety-five dollars, seventy-six cents.

Valparaiso, April 7, 1875.

(Signed) ALSOP & CO. IN LIQN.

Approved and correct in all its parts without right of claim on my part.

Valparaiso, April 7, 1875.

(Signed) PEDRO LOPEZ GAMA.[a]

The accuracy of this account is attested by numerous press copies of statements of account from Alsop & Co. to Gama found among the papers in the possession of the liquidators. The earliest statement found is the one dated December 31, 1870, covering the

[a] See Appendix, p. 36.

transactions for that year. This account shows the balance due on the general account between Gama and Alsop & Co. on December 31, 1869, as $520,516.34, and at the close of business on December 31, 1870, the amount due on that date was $582,135.59. If to this amount interest be added for one year at 10 per cent, the amount due on December 31, 1871, will equal $640,349.15.

The press copy of the statement of account current dated December 31, 1870, between Gama and Alsop & Co. contains an itemized statement of the transactions for that year, but some of its pages are so badly faded that the individual items can not in some instances be read. The totals are clear, however, and a summary of the account is printed in the Appendix to the Counter Case of the United States, page 37, and the press copies of this and the other accounts are held for the examination of His Majesty and the Chilean Government, should such examination be desired.

On December 30, 1871, another account current was rendered, which, as no advances were made during that year, shows the balance due on December 31, 1870, and this amount, with interest added for one year, makes the amount due at the end of 1871 equal $640,349.15. No further advances were made on this account, and to arrive at the amount due on this account on April 7, 1875, the date of Gama's assignment to Alsop & Co., it is only necessary to add to this sum the interest at 10 per cent per annum.

Similar checks may be obtained on the "special" account. By a statement of account rendered December 31, 1870, the amount due from Gama to Alsop & Co. on this account on December 31, 1869, was $56,574.61, and the balance due on December 31, 1870, was $63,764.69. A press copy of this account is held for examination and a copy thereof will be found in the Appendix to the Counter Case, page 38. The Government of the United States also submits a similar copy of an account current rendered December 31, 1871, which shows the amount due on the "special" account on that date to be $70,141.16. This it will be observed is an increase of 10 per cent over the amount last named, which corresponds to the interest for that year.

There is a third account, known as the "special account of advances," designated on the 1875 account as "advance account." By statement rendered December 31, 1871, the amount then due on this account was $95,156.80.

Thus, on December 31, 1871, as shown by copies of accounts current rendered at the time, the following amounts were due Alsop & Co. by Gama:

Special account	$70, 141. 16
Advance account	95, 156. 80
General account	640, 349. 15
Total	$805, 647. 11

It will be seen at a glance that the three accounts mentioned above are taken as a basis for the general statement already set forth in full, the total amount with interest due on these three accounts on April 7, 1875, being $1,101,210.26. To this amount there is added in the statement of the balance of account a further sum ($186,395.50) due on the special account, which covered the expenditures made by Alsop & Co. for Gama's account during the years 1871 to 1875.

The Government of the United States also has in its possession a duplicate original of an acknowledgment, signed by Gama's own hand under the same date, April 7, 1875, in which Gama states that the amount of his indebtedness to Alsop & Co. was one million two hundred and eighty-seven thousand five hundred and ninety-five dollars and seventy-six cents ($1,287,595.76), the precise amount stated in the balance of accounts given above. This instrument reads in full as follows:

> "Be it known by this document that, by the accounts current which Messrs. Alsop & Co. in liquidation, of Valparaiso, have rendered to me to this date, in conformity with the various contracts which I had celebrated with them, it results that I am owing to the mentioned gentlemen the sum of one million two hundred and eighty-seven thousand five hundred and ninety-five dollars and seventy-six cents, in current money of Chile, which sum will gain interest at rate of ten per cent per annum until the total cancellation thereof. I hereby give my approval to the said accounts current in all their details without further right of claim on my part, and in testimony thereof I sign the present in duplicate before witnesses in Valparaiso on the 7th of April, 1875.
>
> "PEDRO LOPEZ GAMA.
>
> "(Signed) M. L. KEOGH.
> "A. MCHAUL."

The Government of the United States also holds a Spanish copy of the statement of account, dated April 7, 1875 (already quoted above), the original of which copy appears to have been certified in 1875 by D. J. Williamson, United States Consul at Valparaiso, and to have been filed in the suit brought by Pedro Lopez Gama in

1880 to recover a portion of the amount received, or to be received, by Alsop & Co. in liquidation from the Bolivian Government. Inasmuch, however, as the Government of Chile appears to have taken these records from the archives and transmitted them to London for use by the Government of Chile in connection with this case, it has not been possible for the Government of the United States to verify its supposition that this formed a part of the record in the Gama suit. Inasmuch, however, as the records are in the possession of the Chilean Government, it will doubtless be possible to verify this supposition, if such verification is desired.

It is therefore submitted that so far as the dealings between Gama and Wheelright are concerned it must be regarded as fully demonstrated that Alsop & Co., during the course of the long financial relations which existed between them and Gama, advanced to Gama immense sums of money, sums which indeed exceeded by more than 50 per cent the amount finally recognized by the Bolivian Government in favor of Alsop & Co. (i. e., while the debt due from Gama to Alsop & Co., as per the statement of account rendered and acknowledged by Gama, equaled $1,287,576.76, the amount finally recognized by Bolivia as due from Bolivia to Alsop by reason of the assignment by Gama to Alsop & Co. of Gama's rights against Bolivia, equaled only 835,000 bolivianos, a loss to Alsop & Co., assuming that dollars and bolivianos are equal, of 452,576.76 bolivianos, or dollars, as the case may be), and it must therefore be recognized as finally and definitely established that, so far as the relationship between Alsop & Co. and the credit recognized by the Wheelright contract is concerned, such relationship is wholly just, fair, and equitable.

The case, therefore, stands thus, that so far as the relationship between Gama and the Government of Bolivia is concerned, it is established that there was not only an adequate consideration, but there is much reason to believe an absolutely *equivalent* consideration for the guano rights conferred upon Gama by Bolivia, and that so far as the relationship of Alsop & Co. to the assigned Gama credits is concerned, Alsop & Co. really lost more than one-third of their debt against Gama when they accepted in place thereof the debt against the Bolivian Government for 835,000 bolivianos, as finally recognized by that Government. In the face of these definite data it is unnecessary to characterize or further comment upon the charges made by the Government of Chile, as quoted above, that the claim is of "doubtful legal origin," of a

"highly speculative character," "old and so slightly recorded," and "old and so nebulous."

At the same time it must be admitted that the claim is, as repeatedly charged, "old," but its age has not come through any laches of either the claimants themselves or the Government of the United States, for both have for more than a quarter of a century vainly striven to secure the payment of this obligation from the Government which they regarded as responsible for the same. It would seem, therefore, that, having thus delayed payment for all these years, that Government may not now invoke the age of the claim in order to cast doubt upon its validity.

With the antecedents of the claim thus before him, His Majesty will be able to appreciate and qualify certain statements set forth below, made by the Government of Chile in its "Historical Outline" of this case. However, before discussing these statements it might be well to call attention to the fact that absolutely the only documents submitted by the Government of Chile upon the matter of the guano exploitations in the Bolivian Littoral are dated in July and August of 1872, or several years after the injuries and losses had been inflicted upon Gama, for which losses the 200,000-ton concession was granted as compensation, and there is nothing whatever to indicate what, if any, connection the documents there submitted by the Government of Chile have with the matters under discussion.

Moreover, no evidence whatever, nor documents of any sort, have been submitted by the Government of Chile in support of the various contentions and allegations hereinafter set forth.

STATEMENT OF CHILEAN CASE.

> "In 1871 the Governments of Chile and Bolivia entered into a contract with one Henry Meiggs, a citizen of the United States, for the exploitation and sale of 400,000 tons of guano, at the price of 14 dollars per ton. Before the contract was signed, Don Pedro Lopez Gama, a Brazilian subject, came forward, alleging a concession to himself, apparently gratuitous, from the Bolivian Government of about 200,000 tons of that manure, and consequently opposing the carrying out of the contract with Meiggs." (Chilean Case, p. 4.)
>
> "Bolivia, however, in order to obviate the obstacles presented by that concession to the completion of the contract with Meiggs, went so far as to cede to Lopez Gama her share in the sale of the 400,000 tons to Meiggs. An agreement in this sense was made at Cobija on the 26th October, 1871, between the said Lopez Gama and Don Mariano Montero, the Plenipotentiary of

> Bolivia to Chile, and under the terms thereof the former renounced all his claims against the Bolivian Government." (Chilean Case, pp. 4, 5.)

So far as the records of the Government of the United States show, there are a number of inaccuracies in these statements.

In the first place, it does not appear that Gama ever objected to the sale of the 400,000 tons of guano in 1871, and that, on the contrary, he was entirely willing that such contract of sale should be made. In the agreement entered into between Lopez Gama and Don Mariano Montero under date of October 26, 1870 (not, as stated in Chilean Case, October 26, 1871, and this difference in date is of vital importance in reaching a correct understanding of this transaction), it appears that Gama stated that "it not being his desire to cause difficulties to the Supreme Government of Bolivia, nor to the Supreme Government of Chile, with diplomatic disputes and claims, he would consent to lay aside the unquestionable right he had to claim the 200,000 tons in specie," and as a substitute for his rights, which he then had and which he had possessed since the contracts of 1867 and 1868, he proposed that as "of the 400,000 tons of guano to be sold on May 1 [of the year following, i. e., 1871] in the office of the Minister of the Treasury of Santiago de Chile, 200,000 tons were apportioned to Bolivia, and as this was exactly the number adjudicated to him and owing him by the Bolivian nation, it would be entirely just that he should be substituted for the Government in the matter of the value of said 200,000 tons, at the price which they brought at the sale." (Appendix, p. 387.) This offer Montero accepted.

It will thus be perceived that Gama did not, at this time, and could not, oppose "the carrying out of the contract with Meiggs," for the simple and sufficient reason that at that time no contracts had been made with Meiggs, nor was a contract made with Meiggs as to these 400,000 tons until the 1st of May next following, i. e., May, 1871, the date on which such auction was to occur.

The facts which the learned counsel for the Government of Chile evidently had in mind at the time he prepared this statement are that in 1867 and 1868 the Government of Bolivia granted to Gama (as a compensation for the losses inflicted upon Gama by virtue of the rival concessions granted to others either by Chile alone or by Chile in conjunction with Bolivia) some 200,000 tons of guano; that after the granting of these rights to this guano the Government of Chile in December of 1868 undertook to grant to Henry Meiggs a contract for exploiting guano in the Bolivian

Littoral, which contract conflicted with Gama's rights; that thereupon Gama protested against the consummation of this contract of 1868–69, which thus interfered with his rights, and upon such protest the Bolivian Government, together with the agent of Meiggs in Bolivia, so amended the Gama contract as to recognize in Gama the right to exploit and export the guano to which his earlier contracts entitled him. This arrangement was made in February, 1869, more than two years prior to the sale in Santiago of the 400,000 tons of guano to which the Case of the Government of Chile refers.

The Chilean Case continues:

STATEMENT OF CHILEAN CASE.

> "The Government of Chile, therefore, opposed the delivery to Lopez Gama of the guano claimed under this alleged concession. The matter was a serious one, inasmuch as a concession permitting Lopez Gama to ruin any other competitive enterprise by fixing the price of an article which cost him nothing but the price of getting it rendered illusory the rights of Chile to half the guano product, and was equally destructive of their right of intervention for the purposes of its exploitation and sale. Meiggs also, on his side, was unwilling to sign the proposed contract with such a competitor and under such abnormal conditions." (Chilean Case, p. 4.)

Concerning the statement that Gama held an "alleged concession" it is sufficient to state that Gama's concessions were public instruments, properly negotiated and concluded by Bolivian officials having due authority, and that some of them at least passed through the Chilean Foreign Office for authentication.

Regarding the statement that Gama's guano "cost him nothing," it is sufficient to refer to the statements already made that this guano was granted to him in compensation for immense losses which he had suffered. While as to the allegation that Meiggs "was unwilling to sign the proposed contract with such a competitor and under such abnormal conditions," it is difficult to perceive how this can be an accurate statement, inasmuch as Gama's rights to Bolivia's share of the 400,000 tons were secured by a contract dated October 26, 1870, while the auction sale of the 400,000 tons did not occur until May 1, 1871, more than six months later, and inasmuch therefore as the signature of the contract of sale could not well have been made until the later date, i. e., the date of the sale at public auction, it is difficult to see how Gama's attitude six months earlier could have any effect.

The Chilean Case continues:

STATEMENT OF CHILEAN CASE.

> "Though the Chilean Government were entitled as co-owners of the guano to satisfy themselves of the origin of the concession to Lopez Gama, the Bolivian functionaries never gave them any explanation, nor could the Chilean diplomats in Bolivia obtain satisfaction in relation thereto." (Chilean Case, p. 4.)

In view of the fact that all of the Gama guano contracts were public documents formally enrolled and recorded in the public archives at Cobija and La Paz, it is not easy to understand how the difficulty to which the Chilean Government herein refers could arise. It is moreover in evidence, as was pointed out above (see Appendix, p. 333), that formal diplomatic notes passed between the Governments of Bolivia and Chile regarding Gama's difficulties with the Chilean subject Don Matias Torres; and, further, that on January 23, 1869, Gama made at Valparaiso, before a notary and witnesses, a formal protest against the Arman contract, calling attention to his (Gama's) contract rights in the guano of the Littoral and stating that he came "to protest, once, twice, three times, as the law permits, against the Supreme Government of Bolivia, against the Supreme Government of Chile, or against whomsoever I have the right in law, for the value of the 100,000 tons of guano and for the loss and damage which the new contracts made [with Arman] or to be made may have occasioned and will occasion me, and for the failure of the fulfillment of the public contract which I have cited, leaving free and unimpeded my rights to present a claim in the manner and form most suitable or as the law directs, for the value of the aforesaid, and further, for interest, expenses, etc." (Appendix, p. 384.) Inasmuch as at the time this protest was made Gama had already secured all of the actual concessions he ever obtained from the Government of Bolivia, and referred thereto in his protest, it would seem that the Government of Chile had at its disposal sufficient data to enable it to understand the Gama transactions.

STATEMENT OF CHILEAN CASE.

> "It may be stated that, in 1863, when the boundary discussion between Bolivia and Chile was in its most heated period, Lopez Gama appeared as a principal party in certain rebuffs to which the Chilean citizen Don Matias Torres was subjected, in the confiscation of his goods and his incarceration for exploiting guano in the disputed territory." (Chilean Case, p. 5.)

As set forth above, the rebuff received by Torres consisted in the judgment issued by a court having jurisdiction in the matter, the judgment declaring that Torres should be ejected from certain properties to which Gama was entitled. It appears, moreover, that Torres refusing to deliver the property to Gama, to whom it had been adjudicated, the officer appealed to the local Bolivian authorities of the Central Government at La Paz, which in turn took up the question diplomatically with the Government of Chile, which Government seems to have confined its action at that time to the mere suggestion that the damages assessed against Torres were excessive and should therefore be reduced. Torres, it will be recalled, was operating under an alleged Chilean license to mine guano at Mejillones, which at that time was administered entirely by Bolivia, though Chile had made an indefinite claim to a portion of the territory.

STATEMENT OF CHILEAN CASE.

> "It may be that the origin of the great concessions made to Lopez Gama was the desire of Bolivia to compensate him for the damages he had sustained under the treaty of 1866." (Chilean Case, p. 5.)

On the contrary, as has been fully set forth above, the concession of 200,000 tons of guano was made to Gama to compensate him for losses and injuries inflicted upon him by reason of conflicting concessions granted to rival exploiters by the Government of Chile alone or by the Governments of Chile and Bolivia acting in unison.

STATEMENT OF CHILEAN CASE.

> "But by the 7th article of this Treaty it was agreed that the high contracting parties should give as an equitable settlement an indemnity of 80,000 dollars, payable with 10 per cent. of the net proceeds of the Customs of Mejillones to the individuals who had been damnified through the boundary question.
>
> "As appears from the supreme decree made in 1872, and duly included in the documents produced, the Chilean Government complied with the arrangement in the Treaty by paying in full to the damnified parties the sum of 40,000 dollars, which was half of the amount fixed under Article 7 of the recited Treaty." (Chilean Case, p. 5.)

It is not perceived what relevancy this statement has to the matters previously discussed. It should be remarked, however, that it would appear from the documents submitted by the Government of Chile (see Appendix, Chilean Case, p. 8) that

the sum named was paid to Torres and others, Chilean subjects. If, as suggested by the Chilean Government, Gama was injured by virtue of the treaty of 1866, and if article 7 of that treaty provided for the payment of compensation to those who had been injured by that treaty, why did the Government of Chile not pay a portion of its moiety to Gama to compensate him for his losses?

(*d*) STATEMENTS OF ACCOUNT BETWEEN THE CONCESSIONARIES AND THE GOVERNMENT.

STATEMENTS OF CHILEAN CASE.

> "If Alsop & Co. can establish any just claim against Chile the amount of damages must be proved with precision and by the disclosure of all books and accounts. Credit must be allowed for all sums received by Alsop & Co. under any Agreement for which it is sought to make Chile responsible, and accounts must be rendered and full explanations given of the dealings of Alsop & Co., in pursuance of any such Agreement." (Chilean Case, p. 2.)
>
> "Alsop & Co. received from Bolivia considerable sums on account of her claims. Have they ever rendered an account of them?
>
> "As is known, Alsop & Co. received from Bolivia the right of working a number of mining properties in one of the richest silver mining regions in the world, then at its most prosperous stage, and it would be strange if, whilst all the mines of the district enriched their owners, only those which Alsop & Co. held and chose to their liking have produced nothing.
>
> "As already shown, they worked freely, and during the 25 years of their contract with Bolivia, the mines that she delivered to them, and of whose possession Chile did not deprive them. It is known that these mines produced profits. It will be said that this is a question that belongs only to Bolivia, the debtor: but Bolivia, as is clear from the documents already cited, gave Chile the right to qualify, study, and liquidate these claims; there is, therefore, assuredly a right to make these inquiries of the United States Government, who, undoubtedly, on lending Alsop & Co. their powerful patronage, must have the necessary means of satisfying this natural requirement on the part of those whom it judges debtors of a claim so old and so slightly recorded.
>
> "It can be proved by numerous trustworthy witnesses that Wheelwright worked these mines for many years, either personally or by means of companies with which he had shared his rights.
>
> "There exists grounds for supposing that Alsop & Co., or, rather, their liquidator, Wheelwright, never

> accounted for his working of the mines, either to the Government of Bolivia nor even to its representatives, the then partners of Alsop & Co. And if he has given any account of it, should Chile not have a right to inspect it?" (Chilean Case, p. 49.)
>
> "Again, Alsop & Co. should explain their dealings with the Arica customs, and account for any sums received by them in respect of these customs." (Chilean Case, p. 50.)
>
> "Whether to liquidate this credit it is indispensable or not that the house of Alsop & Co. should further render a detailed account of administration of the mines which she received from the Government of Bolivia and which she has worked for many years under the obligation of applying their produce to the payment of this very claim." (Chilean Case, p. 52.)
>
> " * * * and (3) because far from having had damages from this cause, they had profits of which the liquidators of Alsop & Co. have never rendered an account either to Bolivia or to Chile, nor, as we understand, to their own partners." (Chilean Case, p. 53.)

In reply to these statements of the Chilean Case it should be observed that as to the Arica customs receipts no statement of account between the Government of Bolivia and the company is possible, since, as will be apparent to the Government of Chile after it has considered the various treaties involved in this case, that Government seized the Arica custom-house and appropriated the Arica customs collected therein before any sums accrued to the concessionaries under their contract.

Regarding the statements of account between Alsop & Co. and the Government with reference to the operation of the government estacas, it will be observed—

(1) Statements of account were submitted to the Government of Bolivia each half year from the date of the contract up until the Bolivian Littoral was seized and occupied by the Chilean forces. (Appendix, p. 72.)

(2) Statements of account from 1877 until 1892 were filed before the United States and Chilean Claims Commission meeting in Washington in 1893–94 pursuant to the provisions of the treaty signed at Santiago on August 7, 1892. (Appendix II, Case of the United States, p. 33.)

(3) Statements of account of receipts and expenditures in connection with the operation of the estacas from the date of the contract until its expiration in 1901 were set forth in Appendix I, Case of the United States, page 482 et seq.

Concerning this question that the Government of Chile should have the right to inspect these accounts, the Government of the United States submits the following statement:

Under date of August 19, 1910, the American Chargé d'Affaires at Santiago was instructed to the following effect:

> "The Government of the United States has at the Department of State in Washington the original books of account of Alsop & Co., from 1876 to the present time. It is from these books that Alsop & Co.'s accounts (for and against Chile) submitted in the case of the United States have been compiled. The Government of the United States is glad to extend to the Government of Chile an invitation fully and completely to examine these books at the Department of State should the Government of Chile so desire." (Appendix, p. 26.)

This tender was made to the Government of Chile through a note addressed by the American Chargé d'Affaires to the Minister of Foreign Relations under date of August 20, 1910, which reads as follows:

> "* * * I am directed by my Government to state to your excellency that the Government of the United States has at the Department of State in Washington the original books of account of Alsop & Co.
>
> "It is from these books that Alsop & Co.'s accounts (for and against Chile) submitted in the case of the United States have been compiled. The Government of the United States is glad to extend to the Government of Chile an invitation fully and completely to examine these books at the Department of State, should the Government of Chile so desire.
>
> "I trust that if your excellency desires to cause these books to be examined, you will not hesitate to take advantage of this invitation, extended in a spirit of such friendliness on the part of the Government of the United States." (Appendix, p. 27.)

Under date of August 29 the Minister of Foreign Relations for Chile merely acknowledged the receipt of this note, this acknowledgment being received by the American Chargé on September 13.

The Government of Chile has thus far made no request to examine these accounts, which, however, are held subject to examination by that Government and also to examination by His Majesty, should such examination be desired.

Chilean Case, Part III.—Locus Standi of Alsop & Co. and of the United States.

STATEMENTS OF THE CHILEAN CASE.

> "As hereinbefore set out, Alsop & Co. claim to be assignees of the claim of Lopez Gama against the Bolivian Government, founding themselves herein upon the transaction effected on the 24th December, 1876. * * *
>
> "In this transaction the name of Chile does not even appear, as she had at that time nothing to do with the debts of Bolivia. And in this sense the creditors themselves must have understood it, since it never occurred to them to claim that Chile was their debtor, nor did they ever present themselves before her Government, or her courts of justice, to request the payment of this claim.
>
> "The only claims made by them were with a view not of recovering the debt itself, but only to assert an indemnity for damages alleged to have been sustained through the war. These claims were never made before the Chilean courts, nor was any attempt ever made to invoke their aid.
>
> "It may, in fact, be stated, once for all, that on no occasion, either before or after the Treaty of Peace with Bolivia of 1904, when Chile took over the payment of this claim in the form therein set forth, did Alsop & Co. put forward the slightest claim, either to the Government of Chile or to her Tribunals, for payment of this debt." (Chilean Case, p. 7.)

It may, in the first place, be observed that a most causal reading of the contract of December 26, 1876, between John Wheelwright and the Government of Bolivia will show that the allegation of the Government of Chile that Chile was not a party to this contract is correct. The Government of the United States has obviously, therefore, never contended that Chile was a party to the contract, and the liability of Chile in the premises rests on other grounds than that she was a party to said contract. For the exact grounds upon which the present obligation of Chile rests His Majesty is referred to the Case of the United States, Points II and III, pages 111–352.

It would appear that with reference to the matters referred to in the extract quoted, as with reference to other matters to which

reference has already been made or which will hereafter be discussed, the learned counsel having charge of the preparation of the Case for the Government of Chile had not before them a complete record of the correspondence and documents pertaining to this case; for an examination of these documents, even those which were before the United States and Chilean Claims Commissions of 1892 and 1897, would have shown to the learned counsel that the claimants through their duly accredited agents, not once, but many times, called the attention of the Government of Chile to their rights under the contract of December 26, 1876, and asked that such rights be respected and protected by the Government of Chile.

Before discussing in detail the documentary evidence establishing this allegation it will be well to bear in mind, what was quite fully discussed in the Case of the United States (see pp. 160 et seq. and 232 et seq.), that under the Wheelwright contract of 1876 provision was made for two distinct matters: First, the contract recognized as due to Wheelwright a certain sum specified, namely, 835,000 bolivianos, which sum was to draw interest as provided and to be liquidated in the first instance from the Arica customs receipts over and above a stated amount (a certain further sum being also recognized as due by way of accrued interest, for the payment of which accrued interest special provision was made); and in the next place the contract provided in express terms for a twenty-five-year lease of the government estacas located in the Bolivian Littoral, this latter part of the contract constituting a mining concession. The terms of this mining lease were such that the concessionaries took 60 per cent of the net proceeds of the mines as profit and a return for their risk and the Government of Bolivia took the balance, or 40 per cent, of the net proceeds as its share in the leasehold transaction, it being further provided that the 40 per cent belonging to the Bolivian Government should be applied to the payment of the debt of 835,000 bolivianos, with interest (recognized as due in the other part of the Wheelwright contract) until such debt and interest should be paid. With these facts in mind the following correspondence should be read in connection with the statement in the Chilean Case (*supra*), that "on no occasion either before or after the treaty of peace with Bolivia of 1904, when Chile took over the payment of this claim in the form therein set forth, did Alsop & Co. put forward the slightest claim, either to the Government of Chile or to her tribunals for payment of this debt."

Claimants' Appeal to Chilean Government for Recognition of Their Contract Rights.

As early as September 11, 1882, in a communication dated at Valparaiso, John Stewart Jackson, a British subject resident in Chile, addressed to the Chilean Government, as the attorney of John Wheelwright in the matter of representations to and before the Government of Chile upon this claim, a formal communication in which he made use of the following language:

> "Without discussing, for the present the origin of the debt of the Government of Bolivia, *your Excellency will observe*, by the document No. 1, which I accompany in copy, *that said Government acknowledges its indebtedness to the house of Alsop & Company, of Valparaiso, of which John Wheelwright is partner and representative (Art. 1), for the sum of eight hundred and thirty-five thousand bolivianos ($835,000), with the annual interest of five per cent. from the date of the contract, 26th December, 1876, to be paid off first by the excess of the Custom House duties of Arica (Northern Custom House), over and above the four hundred and five thousand bolivianos ($405,000) paid by Peru to Bolivia, either obtained by a new treaty or by establishing a national Custom House (Art. 2); and besides there were adjudicated, for the cancelment of said debt, all the mines of silver of the State (Estacas Minas), in the Coast Department, the debt to be so liquidated by the payment of forty per cent. of the net profits, except the mine Estaca 'Flor del Desierto' (Art. 3). By Art. 4 the mine Estaca 'Flor del Desierto' and another mine, to be chosen by the parties interested, were ceded for the payment of account interest, one hundred and sixty thousand seven hundred Bolivianos ($160,700), due up to the 26th December, 1876, applying fifty per cent. of the nett product of the one mine and forty per cent of the other.*" (See App. II, Case of the United States, p. 136.)
>
> * * * * *
>
> "*During the war which actually exists between Chili and Bolivia, one can understand that whilst there is an armed occupation, or whilst no new treaty of limits is celebrated between the two nations, determining the territory of each, Chili may take the place of the enemy in all its rights and prerogatives, exacting Custom House dues, taking possession of the landed property of the Bolivian Government and recovering the dues and contributions previously existing. But without transgressing international law, it can not take away from foreigners who have had no part in the war, rights legitimately acquired in time of peace, nor can it confiscate their property, much less in the present case, when the occupation on the part of Chili of the Custom House of Arica deprives Mr. Wheelwright of a part of what was adjudicated for the payment of the debt of the Bolivian Government, and which now amounts to more than one million of dollars ($1,000,000), and also, on the other hand, this same occupation has caused heavy prejudices and losses to Mr. John Wheelwright, as will afterwards be shown.*" (See App. II, Case of the United States, pp. 138–139.)

Mr. Jackson concluded this communication to the Chilean Government in the following language:

> "The undersigned does not think it necessary, for the present, to support his representation with many additional arguments which might be brought forward to confirm the rights of Mr. John Wheelwright, and solely begs to accompany the power of attorney which accredits him, duly executed before the notary, Julio Cesar Escala, dated 25th October, 1878, and a legalized certificate of the notice published in La Paz (document No. 4), *begging your Excellency to adopt such measures as may be conducive to place Mr. John Wheelwright in possession of what he has legitimately acquired, which is justice, &c.*" (See App. II, Case of the United States, p. 142.)

It will be observed from these extracts that as early as 1882 the attorney for John Wheelwright in presenting the matter to the Chilean Government distinctly called attention to the two features of the Wheelwright concession, i. e., the debt which was recognized as due and the leasehold interest which was held as a mining concession; called attention to the fact that the Government of Chile was interfering with both the custom-house receipts and the operation of the mines; and requested in his prayer for relief that the Government of Chile place Mr. Wheelwright in possession of "what he has legitimately acquired." It would thus appear that while the war was still in progress, and while Chile was appropriating all of the funds from the Arica custom-house, which, as the returns show, had up to this time amounted to more than a million dollars a year (see Case of the United States, p. 263), the Government of Chile was put on notice, in a formal document delivered to the proper authorities of the Government, and afterwards answered by them, concerning the rights possessed in the custom receipts and in the mines by the claimants under the Wheelwright contract of 1876.

A little more than a year later, November 21, 1883, Mr. John Stewart Jackson, as the representative of Mr. Wheelwright, addressed a second communication to the Chilean Government, in which the same matters were again discussed, the rights of the claimants under the contract being again pointed out, and the prayer again made that such rights should be respected. The pertinent portions of this document read as follows:

> "By the first article of the decree of the 24th of December, the Bolivian Government, accepting the representativeship of Mr. Wheelwright, celebrated with him a contract by which it acknowledged itself the debtor of Messrs. Alsop and Company, as cessionaries of Mr. Pedro Lopez Gama, for the sum of eight hun-

dred and thirty-five thousand Bolivian dollars ($835,000), together with the annual interest at 5 per cent from the date of the execution of the contract.

"By the second article it compromised itself to pay the said capital and interest by drafts drawn for the full amount, in trimonthly proportions, on the excess which, from the date of the termination of the Customs Contract with Peru, there might be in the receipt of duties from the Northern Custom House, corresponding to Bolivia, over and above the four hundred and five thousand dollars ($405,000) rendered by the Peruvian Government, whether the customs treaty should be renewed with that Republic, or whether the National Custom House should be re-established.

"By the third article there was adjudicated to the amortization of the same debt all the Mining Setts of Silver (Estacas Minas de plata) belonging to the State in the Coast Department, the said amortization to be carried into effect with forty per cent. of the net profits of each, with the exception of the Mine (Estaca) called 'Flor del Desierto,' which, with another which Mr. Wheelwright has the right to select, was adjudicated by the fourth article to the payment of the interest then due.

"By the first article of the decree of the twenty-third of December, which regulated the working of the adjudicated mines, the term of three years was conceded to Mr. Wheelwright for the investigation of the mines and for looking for the necessary capital to place work on them.

"By the second article he was authorized to organize collective or anonymous societies for the exploitation of one or more mines, and to contract for same with the proprietors of adjacent mines.

"By the sixth article it was determined that the duration of the contract should be twenty-five years." (App. II, Case of the United States, pp. 263–264.)

* * * * *

"*From what has been explained up to the present, it follows that the Bolivian Government, recognizing itself the debtor of Messrs. Alsop & Company, the cessionaries of Mr. Pedro Lopez Gama, obliged itself to pay Mr. Wheelwright, as the representative of Messrs. Alsop & Company, with the Custom House receipts alluded to in the second article of the decree of the 24th December, and with forty per cent. of the net profits of the Mines of Public Instruction of the Coast Department, mentioned in the third article, which, with that object, were adjudicated to him by the contract. It follows, moreover, that, although the Bolivian Government proceeded to the celebration of this contract with ample powers, namely, those given it by the laws of the 19th October, 1871, and of the 26th November, 1872, the National Congress approved the transaction afterwards by means of an express and definite law.*" (App. II, Case of the United States, p. 265.)

* * * * *

"The fact is, nevertheless, that under pretext of the Chilean occupation, the rights of Mr. Wheelwright are ignored, and impediments and difficulties are thrown in his way, which not only occasion him a thousand annoyances and expenses, but which have prevented, and do prevent, him from realizing the

object of his contract." (App. II, Case of the United States, p. 269.)

* * * * *

"*Mr. Wheelwright, therefore,* considering that the Contract which he celebrated with the Bolivian Government respecting the Mines of Public Instruction is perfectly valid; that the said Contract has remained subsistent, notwithstanding the rupture of the treaty of limits of the year 1874; that not only is it equitable, but even just, that Chile should respect that Contract; and that, possessing the security of the rights which by it he acquired for Messrs. Alsop and Company, it would be easier for him to organize private undertakings for the working and exploitation of the Mines, with advantage to those whom he represents and to the country itself, *has deemed it opportune and convenient to direct himself at this time to your Excellency's Government,* now that his previous efforts, which were accompanied by the respective antecedents, have not given him any result whatever, *in order that in the treaty of peace which may be adjusted with the Bolivian Government, or in any other effective manner, the Contract which he celebrated with the Government of Bolivia, and which was put into the form of a public deed on the 26th December, 1876, may be recognized as valid and subsistent, and that he may be guaranteed the free and complete exercise of all the rights which it confers upon him, exactly as if no change whatever of dominion had taken place in the territory in which the mines are situated—which is justice, &c.*" (App. II, Case of the United States, p. 270.)

It would appear from these extracts that while in this communication Mr. Jackson, as representative of Mr. Wheelwright, had his mind chiefly fixed upon the mining rights conveyed to Wheelwright by the concession of 1876, and that he was particularly seeking an amelioration of the conditions existing with reference to those rights, nevertheless he distinctly pointed out the rights which the claimants had upon the Arica customs, and in addition to his special prayers with reference to the mines he requested also that the entire contract be recognized and respected.

Some time prior to the negotiation of the pact of truce of 1884, and apparently after the presentation of the petition last above quoted, Mr. Jackson addressed a third memorial to the Government of Chile, in which the rights possessed under the Wheelwright contract were set forth as follows:

"By article first of decree of 24th of December, the Government of Bolivia accepting Mr. Wheelwright as acting for those whom he represented, concluded a contract with him in which it recognized itself debtor to Messrs. Alsop & Company as transferees of Mr. Pedro Lopez Gama, in the sum of eight hundred and thirty-five thousand bolivianos with interest at five per cent per year from the date of the writing of the contract. By Article second it bound itself to pay said capital and interest, by drafts drawn for the total amount in quarterly proportions

against the excess which, from the date of the expiration of the Customs Contract it had celebrated with Peru, there might be in the receipt of or duties belonging to Bolivia at the Custom House of the North, over and above the four hundred and five thousand dollars allowed by the Government of Peru, and this either in case of the renewal of the Customs treaty with that Republic or the re-establishment of the National Custom House.—By Article three it adjudicated for the amortization of the same debt all the Estaca silver mines of the State in the Department of the Coast (Littoral), said amortization to be made with forty per cent of the net profits of each one excepting the Estaca called 'Flor del Desierto,' which with one other that Mr. Wheelwright had the right to select, were adjudicated by Article four for the payment of past due interests.—By Article first of decree of 23d of December, in which regulations were made for the exploitation of the adjudicated Estaca mines, there was granted to Mr. Wheelwright the term of three years for the exploration of the mines and in which to procure the necessary capital to put them in working order. By Article second he was authorized to organize companies, associated or stock, for the working of one or more estacas, and to make contracts for working with the owners of adjoining mines.—By Article sixth it was provided that the duration of the pact should be for twenty five years.—This was in its principal points all that Mr. Wheelwright could obtain from the Government of Bolivia, after having worked for a considerable period in favor of the recognition of the rights which Mr. Lopez Gama had assigned to his principals in payment of the million & odd hard dollars delivered by these to the former in order that he might make to the Government of Bolivia the advances to which he has hereinbefore referred.—And consequently, from this contract likewise spring the rights of Mr. Wheelwright with respect to the silver mines on the coast of Bolivia known by the name of Public Instruction Estacas." (See App. II, Case of the United States, pp. 201–202.)

* * * * *

"*From what has so far been shown it appears that the Government of Bolivia, recognizing itself indebted to Messrs. Alsop & Company, Transferees of Don Pedro Lopez Gama, bound itself to pay to Mr. Wheelwright as representative of Messrs. Alsop & Company, with the receipts from Customs mentioned in article second of the decree of 24th of December, and with forty per cent of the net profits of the Public Instruction Estacas of the Coast mentioned in Article third, which for that purpose were adjudicated to him by the contract.*" (App. II, Case of the United States, p. 203.)

* * * * *

"*Mr. Wheelwright believing therefore* that the contract made by him with the Government of Bolivia concerning the Public Instruction Estacas is perfectly valid; that said contract has continued in force notwithstanding the rescission of the treaty of boundaries of 1874; and that not only in equity but also in justice Chile should respect that contract; and that if he could assure the rights acquired under that contract by Messrs.

Alsop & Co., it would be more easy for him to organize private associations for the working and exploitation of the Estacas, with benefit to his principals and to the country itself, *he deems it opportune and convenient to address himself now to the Government of Your Excey, inasmuch as his former communications which were accompanied by the respective antecedents, have produced no results whatever, to the end that in the treaty of peace that may be made with the Government of Bolivia, or in any arrangements whatever that may be concluded with the same, or in any other efficacious manner, the contract embraced in the public instrument of 26th December, 1876, made by him with the Government of Bolivia, may be recognized as valid and in force, and that he be guaranteed the full and free exchange of all the rights conferred upon him therein, exactly as though there had been no change whatever in the dominion over the territory in which the Estacas are located.",* (App. II, Case of the United States, p. 207.)

Here again the rights of Wheelwright and the obligations of Chile under this contract were distinctly set forth, both classes of rights being referred to.

Finally it should be observed that in a communication written after the negotiation of the pact of truce of 1884 John Stewart Jackson, as representative of John Wheelwright, again called attention to the rights of the concessionaries under the contract in the following language:

"That Mr. Wheelwright, in his natural interest to secure, on the part of the Supreme Government of Chili, the recognition of his contract, has presented on several occasions petitions tending to secure that object, but up to the present time no decision has been taken to put an end to the uncertainty in which he finds himself in respect of the rights conceded to him by his contract since the occupation of the Bolivian Coast Provinces by the Chilean army.

"Not long since, when an endeavor was being made to arrange the International question between Chili and Bolivia, I presented in his name a new petition, in order that in the treaty of peace, or truce, or cessation of hostilities which might be arranged, his contract should be provided for, and that in the treaty which should be celebrated a clause should be inserted by which the Supreme Government of Chili, as was just, should compromise itself to recognize and respect the contract referred to on the same conditions as Bolivia had granted it.

"After some time *the indefinite* truce was settled, of which the treaty published subsequently gives an authorized account, and in which, notwithstanding my efforts, no mention whatever is made of Mr. Wheelwright's contract, nor has any reason been assigned to me since then of that omission.

"*As Mr. Wheelwright is desirous of having the question defined as soon as possible, I again recur to your Excellency, in his name, in view of the justice of the reasons stated in my last petition as well as of the treaty of peace with Peru, and also of the truce signed with Bolivia, to claim the rights conferred in the subjoined contract, and*

especially in the second clause of the Supreme Decree of December 24th, 1876, incorporated in the said contract, so that in justice to the case you will grant the recognition asked for, since that recognition did not take place in the treaty of truce with Bolivia, which is justice, &c." (App. II, Case of the United States, p. 151.)

Here again the Government of Chile is requested to recognize all of the rights possessed by the concessionaries under the contract.

Finally, it should be pointed out that at the time these petitions were received by the Government of Chile, they were clearly and definitely understood by that Government as referring to and asking relief regarding both the rights of the customs duties and the rights in and to the government estacas. In the report of the Government's attorney to the Chilean Minister of Finance under date of October 9, 1884, the nature and extent of Wheelwright's petitions are set forth as follows :

"According to the petitioner, this contract is a settlement, in virtue of which the Government of Bolivia acknowledged its indebtedness to Messrs. Alsop & Company, of which firm Mr. John Wheelwright calls himself the liquidating partner, as cessionary of Mr. Pedro Lopez Gama, for the sum of eight hundred and thirty-five thousand Bolivian dollars ($835,000), at five per cent. yearly interest, and it compromised itself to pay this capital and interest in drafts drawn for the entire sum in trimonthly proportions, on the excess which there might be, after the date of the termination of the Custom's contract with Peru on the receipt of duties of the Northern Custom House corresponding to Bolivia, over and above the four hundred and five thousand dollars ($405,000) rendered by Peru, either by the renewal of the Custom's contract celebrated with that Republic or by the establishment of a National Custom House.

"It was also agreed to apply to the amortization of the same debt all the silver mines of the State situated in the Coast Department, said amortization being effected by forty per cent. of the net profits arising from each mine.

"For investigating the mines and securing the capital necessary for the work a term of three years was granted to Mr. Wheelwright.

"The duration of this contract was fixed at twenty-five years.

"As your Excellency will observe by this contract, of which I have transcribed the essential part, *the Government of Bolivia acknowledge its indebtedness for a sum of money, and obliges itself to pay it in the manner which is particularly specified.*

"In these circumstances Mr. Wheelwright's representation is directed to procure that the Government of Chile may recognize, in an effective manner, the said contract as valid and subsisting, and that it may guarantee the free and complete exercise of all the rights which it confers exactly as if no change whatever of dominion had taken place in the territory in which the mines are situated.

> "*Consequently what is in reality sought for is that the Government of Chile, accepting as obligatory the contract celebrated by the petitioner with the Government of Bolivia in December, 1876, may recognize the debt of the firm of Alsop & Company for the sum of eight hundred and thirty-five thousand Bolivian dollars ($835,000) and the interest, and, at the proper time, insure the payment of this sum on the same terms and in the same manner as the Government of Bolivia.*
>
> "*I have reproduced the principal antecedents brought forward by Mr. John Wheelwright in order to fix clearly the signification and extent of his petition.*" (App. II, Case of the United States, pp. 277–278.)

In the face of this definite and precise analysis by an official of the Government of Chile of the terms and extent of the petitions which by the end of 1884 had been submitted by John Wheelwright personally or through his attorney to the Government of Chile for the recognition, respect, and enforcement of his contract rights, it is impossible to account for the statements made in the case of Chile (that "on no occasion, either before or after the treaty of peace with Bolivia of 1904 * * * did Alsop & Co. put forward the slightest claim, either to the Government of Chile or to her tribunals, for payment of this debt") upon any other theory than that the learned counsel who prepared the case had not before them the complete files of the correspondence and documents in this claim; otherwise they would not have permitted themselves to make statements so completely at variance with the recorded facts.

Double Liability.

Statements of Chilean Case.

> "The United States Government at once began, long before the Treaty of Peace of 1904 was arranged, to make Chile responsible for this particular obligation of Bolivia. It is specially worth noticing that the United States adopted this course without abandoning the right to claim from Bolivia payment of the same debt." (Chilean Case, p. 7.)

After calling attention to certain notes of the American Ministers at Santiago in which these questions were discussed, the Chilean Case concludes upon this point as follows:

> "Under these circumstances a Chilean firm has found the diplomatic protection of the United States a protection purporting to be exerciseable both as against the Governments of Chile and Bolivia." (Chilean Case, p. 9.)

It is entirely accurate to say, as does the Chilean Case, that the Government of the United States began "long before the treaty of peace of 1904 was arranged to make Chile responsible for this particular obligation of Bolivia." Indeed, it might have been accurately said, as was fully summarized in the Introductory Statement of the Case of the United States (pp. 1–43), and as was fully set forth in the course of the discussion of Point III of the same Case (pp. 232–314), that when and so soon as Wheelwright, after exhausting all efforts, both before the Chilean courts and the Chilean Executive, reported the matter to his Government, this Government at once, through its duly accredited agents at Santiago, brought the matter of the non-observance of Wheelwright's rights to the attention of the Chilean Government and requested that adequate compensation and reparation be made to him. From that time until the signing of the protocol of December 1, 1909, the Government of the United States was constantly endeavoring to secure from the Government of Chile a due and proper recompense for the losses suffered by the concessionaries as the result of the unwarranted actions of the Chilean authorities.

Regarding the other question raised by these extracts as to whether or not the United States is seeking to hold both Chile and Bolivia liable for the obligations imposed by the Wheelwright contract of 1876, it must be said that this matter is immaterial to the decision of the present case, the only question in this case being as to the amount for which the Government of Chile is liable, some liability having been admitted by that Government.

It may, however, be observed, in order that the position of the United States upon this point may be thoroughly understood, that as a matter of fact the Government of the United States has insisted that both Chile and Bolivia were liable for this obligation, and this view has been shared at least in part by the Government of Chile, as is shown by the fact that about and during the year 1904 that Government repeatedly acknowledged a certain limited obligation under its interpretation of article 5 of the treaty of 1904, and insisted that if the Government of the United States were not satisfied with this interpretation the Government of Chile would deliver to the Government of Bolivia the amount called for by the treaty and then remit the claimants and the Government of the United States to the Government of Bolivia for the complete satisfaction of the obligations arising under this contract. (For a more complete discussion of this phase of the question, as well as for extracts of this correspondence, see *infra*, p. 133.)

The precise position of the United States upon this question is as follows:

The contract of 1876 between Wheelwright and the Bolivian Government recognized in favor of Wheelwright a contract debt of 835,000 bolivianos with interest at 5 per cent per annum until paid. The contract also provided that this debt should be paid from a certain source, which was specified. The contract did not provide, and it can not be so interpreted, that if the debt were not satisfied from this source the debt should cease to exist. It is clear, therefore, that the debt must be regarded as existing until satisfied, and inasmuch as the debt was originally due from Bolivia, and inasmuch as neither the claimants nor the Government of the United States have ever recognized any transfer of this original contract obligation from Bolivia to any other power, such contract-debt obligation must be regarded as still subsisting against Bolivia, since it would be impossible for Bolivia, who is but one of the principals to the contract, to transfer her obligations to some third and stranger party without the consent of the second party to the contract. The Government of Bolivia must therefore remain liable upon the original contract until the debt with interest is paid.

The liability of Chile is not a liability upon this contract, as such, and the United States has never, and does not now, so contend. The liability of Chile arises from the following considerations and in the following ways:

First. The Wheelwright contract with Bolivia gave to the concessionaries certain vested property rights and interests in the Arica customs receipts, a portion of which under this contract belonged absolutely to the concessionaries. These funds were arbitrarily and tortiously appropriated by the Government of Chile, which incurred thereby a quasi-contractual obligation for the amount of money so appropriated by that Government. (See Case of the United States, Point III, Sub-Point A, pp. 232–270.)

Second. The Wheelwright claimants and the Government of the United States have insisted and still insist (and in so doing the United States understands that it is carrying out the often expressed intention of the parties) that under the treaty obligations existing between the Governments of Bolivia and Chile, the Government of Chile is under the duty of satisfying this debt in its entirety, but this contention is coupled with the statement that neither the Government of the United States nor the claimants intend by putting forth this contention to be understood as

waiving their rights against the Government of Bolivia nor to substitute Chile under the contract obligation. Pursuant to this plan the Government of the United States has, moreover, repeatedly informed the Government of Bolivia that, should the Government of Chile fail fully to meet the obligation which the Government of Bolivia contends has been placed upon the Government of Chile by the treaty of 1904, the Government of the United States would look to the Government of Bolivia to make good whatever sum was lacking. This is not, therefore, and was never intended to be, a subrogation, the attitude always being that the Government of the United States was willing to receive the payment of this debt from whatever source it might come, but that it was unwilling to relinquish the Government of Bolivia from liability until the payment of the debt had been fully accomplished.

This appears to be precisely the position assumed by the Government of Chile when that Government states "Chile has accepted voluntarily the rôle of a person deputed by Bolivia to pay the house of Alsop & Co." (Chilean Case, p. 40). This, of course, leaves the only contention or disagreement upon the one point of the extent of the obligation assumed. This statement has, of course, reference only to the contract obligation arising from and based upon the contract, and has nothing to do with the obligation arising under the principles of quasi contracts for the customs receipts appropriated by the Government of Chile (see Case of the United States, Point III, Sub-Point A, pp. 232–270), nor to the obligation arising out of the various diplomatic agreements and undertakings as set forth under Point III, Sub-Point C, of the Case of the United States (pp. 283–314).

Third. The Government of the United States has always contended that the Government of Chile had become liable to pay this debt to the Government of the United States for and in behalf of the claimants by reason of repeated promises and diplomatic undertakings made by the Government of Chile to the Government of the United States in this respect. The liability established by these undertakings is, however, entirely separate and distinct from the liability imposed by the Wheelwright contract, and it invokes the Wheelwright contract of 1876 merely to fix the amount of that liability. (See Case of the United States, Point III, Sub-Point C, pp. 283–314.)

Fourth. Lastly, and upon this point the Case of the Government of Chile is not at all clear, nor does it appear to be discussed or

understood, the Government of the United States contends that Chile, and Chile alone, is liable for the tort side of this claim, since the Government of Chile, and not the Government of Bolivia, interfered with and failed to vindicate the mining rights given to the concessionaries by the Wheelwright contract of 1876. With this liability the Government of Bolivia has nothing whatever to do. (See Case of the United States, Point II, pp. 111–231.)

It is thus apparent that the Government of the United States does not now and never has contended for a double liability under or pursuant to the contract of 1876, in that it would exact the payment of the debt from both the Governments of Bolivia and Chile. But if it had so contended that point would not now be material, since the only question before His Majesty is the extent to which the Government of Chile is liable under the facts and circumstances of this case.

DECISION OF THE CHILEAN CLAIMS COMMISSION OF 1901.

STATEMENTS OF CHILEAN CASE.

> "Reference is made to the insistence of the Government of the United States in exacting from Chile the payment of a Bolivian debt, although a sentence of a high international Court has most formally decided that this claim was within the exclusive decision of the Chilean Government." (Chilean Case, p. 9.)
>
> "The Government of the latter country, claiming to ignore the Judgment of the Court which sat in its own capital, has attempted to exercise an intervention which, it is confidently submitted, is justified by considerations neither of law nor of equity.
>
> "Having regard to the terms of the aforesaid Judgment, it would appear superfluous to argue at length that the United States had no right to lend their diplomatic protection to the surviving partners of Alsop & Co., on behalf of a claim which was neither in its origin that of a citizen of the United States nor is so at the present time. But the persistence with which the United States has claimed to exact from Chile the payment of this claim makes it necessary to insist upon this point." (Chilean Case, p. 10.)
>
> "Nor can it be successfully contended that in the present case the firm of Alsop & Co. no longer exists, on the ground that, at the date of the Judgment, it was already in liquidation, and that consequently the claim which the State Department of Washington formulates in its name, is in reality in favor of those interested in that firm, who are United States citizens." (Chilean Case, p. 11.)
>
> "Still less can it be argued, as the representative of the United States attempted to argue in a memoran-

> dum of the 29th December, 1902, addressed to the Chilean Government, that the Judgment of the Arbitration Court, while rejecting the claim, reserved to the Claimants the right to support their claims by diplomatic means, and that consequently the United States may use this method in their favor against the Government of Chile.
>
> "It is sufficient to read the Judgment to appreciate the groundlessness of this contention.
>
> "Under the terms of the Judgment, the Court declared itself incompetent, and the Claimants acquired thereunder no new right, and lost none of those they then had, whether against the Chilean Government or against that of Bolivia.
>
> "They could not assert any claim to redress against Chile except through her Government or Courts of Law. Nor could they properly claim diplomatic protection from a foreign country, for such a claim would be contradictory to the sentence of the Arbitration Court which declared Alsop & Co. a Chilean firm." (Chilean Case, p. 12.)

It is not clear from the quotations made above nor from any other contentions or allegations contained in the Case of the Government of Chile whether that Government invokes the judgment of the United States and Chilean Claims Commission of 1901 as a bar to a recovery in the present arbitration, or whether that Government depends upon the alleged Chilean character of the firm of Alsop & Co. to defeat any award in this case, and in the absence of any express allegation upon this point it is believed that the Government of the United States would be justified in requesting His Majesty to ignore all contentions, arguments, and allegations of this character and consider them for the purpose of this case as nonexistent.

Inasmuch, however, as, in the opinion of the United States, the statements quoted above do not accurately set forth the decision of the United States and Chilean court of arbitration, nor its legal effect; and inasmuch as the contentions set forth in the Case of Chile regarding the significance to be attached to the fact that the American citizens for whom the United States intervened in this case associated themselves together for the purpose of commerce as a Chilean firm, are not in accord with the principles of international law governing this matter, it is deemed desirable that there should be given (1) a brief discussion of the real nature, extent, and meaning of the decision of the arbitral court, and (2) a discussion of the significance to be given to the formation by American citizens, for business purposes in Chile, of a Chilean firm, and the

rights of the Government of the United States to intervene in behalf of such citizens belonging to such firm when and so soon as such citizens suffer injury through their firm at the hands of the Government of Chile.

I. THE NATURE, EXTENT, AND MEANING OF THE ARBITRAL DECISION OF 1901.

The memorial presented in this case to the first American-Chilean Commission shows that the matter was laid before the Commission by Henry Chauncey, acting for himself, Henry S. Prevost, and Henry W. Alsop, who are characterized as the "sole surviving members of the copartnership of Alsop & Co." (App. II, Case of the United States, p. 35), and this appears to have been the form in which the claim was presented to the revived Commission as indicated by the supplemental memorial filed by Mr. Chauncey on September 13, 1900. (App. II, Case of the United States, p. 454.)

The Government of Chile in its defense before the revived Commission, after calling attention to the fact that the arbitral convention provided for the determination of "all claims on the part of corporations, companies, or private individuals, citizens of the United States, upon the Government of Chile," contended that in order for the court to have jurisdiction in any given case presented against Chile it must be first shown that the claim presented was a claim of a citizen of the United States whereas the claimant in this case was Alsop & Co., a partnership organized under the laws of Chile; that under Chilean laws such a partnership formed a juridical entity or person; that a juridical entity or person takes the nationality of the country of its creation; that Alsop & Co. was therefore a firm of Chilean nationality; and that inasmuch as the claim presented to the Commission was a claim on behalf of Alsop & Co., therefore and finally the Commission was without jurisdiction. However, the agent of the Government of Chile, in presenting this defense before the Commission, made (as was pointed out in the Case of the United States, pp. 28 and 298) the following declaration regarding the purpose of Chile with reference to the payment of the claim:

> "As is stated in the claimant's brief, it is among the liabilities that the Government of Chile engaged to pay for the account of Bolivia. This explains exactly the situation of the claim. The Chilean Government has always regarded it, and does still regard it, as a liability on the part of Bolivia toward the claim-

> ant; and in order to induce the Bolivian Government to sign the definite treaty of peace which has been in negotiation for many years, the Chilean Government offers to meet this and other claims as part of the payment or consideration which it offers to Bolivia for the signature of the treaty. This has always been the position of the Chilean Government, and is its position to-day, and if Bolivia signs the treaty, the claim of Alsop & Company, as well as the other claims mentioned, will be promptly paid under the treaty engagement as a relief to Bolivia from the liabilities which that government has incurred and for the account of Bolivia."

The umpire and the Chilean Commissioner, upon the presentation of these arguments and of this formal declaration of a purpose to settle this claim, united in a decision dismissing the case for want of jurisdiction, the American Commissioner dissenting in an opinion well reasoned and convincing.

This decision having been invoked by the Government of Chile, apparently with the thought that it constitutes a bar to further representations by the Government of the United States, it is perhaps worth while to examine with some care the exact meaning and scope of the decision, though the Government of the United States must contend that a commission which does not pass upon the merits of a controversy, but which merely dismisses a claim for want of jurisdiction, can not, by such a decision upon a mere dilatory pleading, impair or in any wise curtail, in equity or in law, the right of the Government of the United States to proceed further in the case.

After some preliminary statements, the majority of the Commission defined the point in the case as follows: "*The sole question to be determined at present is whether or not the Commission can take jurisdiction of this claim.*" (See App. II, Case of the United States, p. 558.) Then, after first examining the nature of a partnership under Chilean law, these Commissioners pronounced it to be their judgment that—

> "From the facts and principles hereinbefore stated, it results, then:
>
> "That the claimant, Henry Chauncey is the agent of Henry S. Prevost, who is the substituted liquidator of the firm of Alsop & Company in liquidation;
>
> "That Alsop & Company is a society '*en comandita simple*,' duly created, incorporated, and registered under the Chilean law with all the formalities of that law, and domiciled in Chile;
>
> "That a society '*en comandita simple*' (precisely like a society *anonima*) forms a juridical person distinct from the members considered individually;

"That under the recognized principles of international law, a juridical or moral person borrows nationality of the State or legislature from which it has received its existence;

"That under the recognized principles of civil law, as applied to commercial societies, such societies continue to exist during liquidation;

"That Alsop & Company in liquidation is still Alsop & Company;

"That Alsop & Company being a Chilean society is a citizen of Chile;

"*And, therefore, that under Article 1 of the Convention of 1892, this Commission has no jurisdiction over this claim.*" (App. II, Case of the United States, p. 568.)

It will thus be observed that the actual judgment of the arbitral tribunal in this case consisted only in a dismissal of the case upon demurrer because of a lack of jurisdiction in the tribunal to take cognizance of the case under the organic charter establishing the commission; and a careful reading of the opinion demonstrates conclusively that the Commissioners did not actually decide, nor did they intend to decide, anything beyond this. Therefore this decision merely means and could only mean that the then existing tribunal could not, in its opinion, entertain and adjudge this claim upon its merits under the terms of the convention of 1892 by which it was created. It is surely unnecessary to submit an extended argument to show that such a decision in no wise passes upon or affects the merits of the controversy thus dismissed without consideration; that the decision must be interpreted and confined strictly within the limits by itself laid down; and that, since it merely determined that under the creating act then existing the tribunal was without jurisdiction to hear and determine the case upon its merits, it could in no degree, even the slightest, be regarded as a bar to the negotiation of a further organic act which should either generally or specifically (as has been done in this case) provide for the consideration of the merits of the claim upon broad and equitable grounds. How accurate this statement is and how completely it applies to this case is shown by the fact that the tribunal did not leave this principle to be inferred or deduced from its decision in this case, but on the contrary it took particular care to point out that such was intended to be the effect of its decision. The court said:

"*The demurrer is sustained wholly upon the ground that Alsop & Company, in liquidation, being a citizen of Chile, this Commission under Article I of the Convention of 1892, has no jurisdiction to entertain the claim.* The case is dismissed, therefore, without prejudice, however, to any rights which the claimant, or claim-

> ants, or Alsop & Company, or its liquidator may have, either by diplomatic intervention or before the Government of Chile, or the courts of Chile. Nor are the merits of the claim in any way prejudiced by this decision." (App. II, Case of the United States, p. 569.)

Language could not be found which would better convey the fundamental principle above stated; and to contend, in the face of such language (which in very terms interprets its own scope and effect and confines its force to a mere preliminary question of jurisdiction, expressly reserving the merits of the case for further and future consideration), that such judgment bars any further consideration of the claim by the two high contracting parties is to contend for that which has no merit of logic and no foundation in law or fact. Moreover, the Government of the United States and the Government of Chile, acting upon the principle so expressly and distinctly stated by the tribunal in its decision, have undertaken further negotiation with a view to such a final subsequent settlement as was contemplated by the tribunal, and such settlement is now sought by the submission of the case on the merits to His Britannic Majesty in accordance with the protocol.

But the Government of Chile, apparently realizing that this contention upon and concerning the meaning and scope of the actual decision of the case could scarcely be depended upon, has—but, it is submitted, with no better success—invoked certain dicta pronounced by the tribunal in order to establish that although the claim was thus dismissed for want of jurisdiction, so saving the merits for further consideration, the tribunal remitted the claimants to the "diplomatic intervention" of Chile. Passing over the incongruities with which such a contention is literally filled—for example, the remitting of American citizens to the diplomatic protection of Chile; the remitting of alien claimants to the protection of the very country against which their claim was made—it is worth while to consider whether these dicta in the decision of the Commission will bear any such interpretation as that which Chile seeks to place upon them.

It should, in the first place, be observed in connection with this point that the agent for the United States before this Commission had contended that the American citizens forming the firm of Alsop & Co. were entitled, as individuals, to compensation for injuries done to the partnership property, and that as individuals they were American citizens and therefore within the purview of Article I of the convention creating the tribunal. In connection

with this contention of the agent of the United States the Commission took up and considered in considerable detail the famous Cerruti case, cited and relied upon by the agent of the United States in his argument upon this matter. It will be recalled that in that case the Italian Government intervened and compelled the Government of Colombia to arbitrate the question as to the damages suffered by an Italian subject who was a member of a Colombian partnership, such partnership being under the laws of Colombia a juridical entity, as was the partnership of Alsop & Co. under the laws of Chile. In the Cerruti case the President of the United States, acting as arbitrator, gave an award in favor of the Italian subject. The American-Chilean Claims Commission, commenting upon the scope of its judgment in this case (that is, that under Article I of the convention of 1892 the Commission had no jurisdiction over this claim) and having in mind the Cerruti case and the contentions based thereon by the agent of the United States, took occasion to remark in precise and clear language, and in the very next sentence following the announcement of the actual judgment dismissing this case for want of jurisdiction, that—

> *"By this conclusion it is not denied that certain cases may arise (like the Cerruti case) in which redress may justly be granted by means of diplomatic intervention to an individual member of a society for injury to the partnership property. * * * The case is dismissed, therefore, without prejudice, however, to any rights which the claimant, or claimants, or Alsop & Company, or its liquidator may have, either by diplomatic intervention or before the Government of Chile, or the courts of Chile."* (App. II, Case of the United States, p. 569.)

It is indeed difficult to explain any more clearly than is explained in the language itself the meaning which should be given to these words regarding the doctrine which the tribunal had in mind and the meaning of the reference to diplomatic intervention. In the first place, the tribunal's reference to the Cerruti case is wholly and absolutely without point, unless the learned Commissioners had in mind the Government of the United States as the intervening State. The relative position of the Government of the United States and the members of the firm of Alsop & Co. was precisely the position of the Government of Italy to Cerruti, and the Commission could have had in mind no other situation when they framed this sentence than that circumstances might arise when the Government of the United States would be justified in intervening in behalf of the American citizens who composed the firm of Alsop & Co., as Italy had intervened in behalf of its subject who was a member of the Colombian firm of Cerruti & Co., and it is incon-

ceivable that any other meaning can be reasonably placed upon these words.

Further, it will be noted that the Commission referred to the *claimant*, or *claimants*, or *Alsop & Co.*, or its *liquidator*. It is indeed idle to contend or to suppose that by these four designations the Commission had in mind the same identical individual or firm.

By the term "claimant" the Commission referred to Henry Chauncey, as is evident by the language used in an earlier part of the opinion, where they inquired—

> "In view of the above article, what is the status of the claimant, Henry Chauncey?" (App. II, Case of the United States, p. 559.)

and by numerous other references to the "claimant's memorial," "brief of the claimant," etc.

Moreover, while the persons included in the term "claimants" have not been so definitely set forth in the opinion, it must be that it referred to Henry Chauncey, Henry W. Alsop, and Henry S. Prevost, described in the memorial and in the decision as the "sole surviving partners" of the copartnership of Alsop & Co.

The decision and judgment of the Commission render it perfectly apparent that by the term "Alsop & Co." the Commission had in mind the Chilean society, which it stated was a citizen of Chile; and that by the term "liquidator" it had in mind, as it expressly stated, Henry S. Prevost, or one who "succeeds him in his capacity."

It can not, it is repeated, be reasonably contended that in thus making four different designations the court had in mind the same individual entity, but that, on the contrary, it had in mind and intended to and did express an opinion regarding four different contingencies which it considered might thereafter arise, namely, intervention for and in behalf of, first, Henry Chauncey; second, Henry Chauncey, Henry W. Alsop, and Henry S. Prevost; third, Alsop & Co., as an entity; and, fourth, intervention on behalf of the liquidator, whoever that might be.

Moreover, it will be observed that it was considered that these four different personalities had before them three distinct classes of rights—first, rights by diplomatic intervention; second, rights before the Government of Chile; and, third, rights before the courts of Chile. These must therefore be regarded as affording three avenues through which remedies may be sought, which avenues are distinct and unconnected.

Finally, it will be noted, therefore, that under the analogy of the Cerruti case there was recognized by the Commission, first, the right generally of diplomatic intervention upon the part of the United States in cases such as the Cerruti case; and, second and specifically, that the diplomatic intervention referred to in connection with the Cerruti case might be exercised in favor, certainly, of the "claimant," or "claimants," and perhaps in favor of Alsop & Co., or its liquidator.

Inasmuch as both the *claimant* and the *claimants* were clearly American citizens, whatever might be the status of the artificial entity of Alsop & Co., or its liquidator, and inasmuch as intervention is contemplated in behalf of such claimant or claimants—American citizens—and having in mind the reference of the tribunal to the Cerruti case in which the claimant bore the same relationship to Italy, the intervening State, that the claimants in this case bear to the United States, it is not possible to see upon what grounds it could reasonably, logically, and successfully be contended that the tribunal did not in its dicta (which are invoked by the Government of Chile) clearly recognize and set forth the principle which underlies and justifies the intervention of the Government of the United States in behalf of the claimants in the present case, and thereby recognize the right of the United States to intervene in this case.

It requires, therefore, no further argument to show that not only is the Government of the United States by this decision not barred from its diplomatic intervention in this case, as the Government of Chile would seem to contend, but that on the contrary the decision expressly recognizes the right of the United States to intervene in behalf of these American citizens if in that Government's opinion the circumstances of the case warrant such intervention.

2. THE SIGNIFICANCE TO BE GIVEN TO THE FORMATION BY AMERICAN CITIZENS FOR BUSINESS PURPOSES OF A CHILEAN FIRM AND THE RIGHTS OF THE UNITED STATES TO INTERVENE IN BEHALF OF SUCH CITIZENS BELONGING TO SUCH FIRM WHEN AND SO SOON AS SUCH CITIZENS SUFFER INJURY THROUGH THEIR FIRM AT THE HANDS OF THE GOVERNMENT OF CHILE.

It will be most convenient to discuss this proposition under two headings: First, that the question of the right of the Government of the United States to intervene in this case is not before the *amiable compositeur* for determination, since it is not and can

not be an issue under the protocol of submission; and, second, that if it were before His Majesty, still under the well-established principles of international law, as they will be hereinafter set forth, the right of the United States to intervene for and in behalf of its citizens under such circumstances as exist in this case is thoroughly recognized and established.

First. *The question of the right of the Government of the United States to intervene in this case is not before the amiable compositeur for determination, since it is not and can not be an issue under the protocol of submission.*

The protocol of submission contains the following stipulations:

> "Whereas the Government of the United States of America and the Government of the Republic of Chile have not been able to agree as to the *amount equitably due the claimants* in the Alsop claim;
>
> "Therefore the two Governments have resolved to submit the whole controversy to His Britannic Majesty Edward VII who as an 'amiable compositeur' *shall determine what amount, if any, is*, under all the facts and circumstances of the case, and taking into consideration all documents, evidence, correspondence, allegations, and arguments which may be presented by either Government, *equitably due said claimants.*" (Case of the United States, p. 1.)

It will be observed that under this protocol the one question which is submitted to His Majesty for determination is the question of the amount due to the claimants in this case, and this amount is to be determined upon equitable principles, taking into consideration all the facts and circumstances of the case. In other words, the question is submitted for a determination wholly upon its merits, and jurisdiction is given and assumed by the *amiable compositeur* for this single purpose. Moreover, since His Majesty is under the protocol charged with the task, which he has graciously accepted and undertaken, of passing upon the amount which is equitably due the claimants, any determination by him which did not involve the determination of such amount would appear to be *ultra vires*. Moreover, and again, the protocol expressly provides that the question shall be as to the amount equitably due the claimants, taking into consideration all the facts and circumstances of the case. In other words, the decision in this case is to be a decision on the merits, such a decision, in fact, as was contemplated by the judgment of the American-Chilean Claims Commission, and such a judgment as that body expressly reserved to be given in this case at some future time when an appropriate tribunal should be constituted.

Again, a decision that the Government of the United States had no right to intervene in this case would not be a decision as to the amount equitably due the claimants, and if such a decision would have any effect whatever under the protocol, which may well be doubted, it could certainly have no other effect than that of a decision as to the jurisdiction of the *amiable compositeur*. But it could scarcely be seriously argued or contended that the two Governments had done so foolish and vain a thing as to submit to His Majesty under a specific agreement providing for the determination of the amount equitably due the claimants under all the facts and circumstances of the case the purely jurisdictional question as to whether or not, the case having been so submitted, His Majesty, the *amiable compositeur*, had any authority or jurisdiction to consider the case. To state such a question or position is to demonstrate its entire untenability.

Moreover, under the peculiar facts in this case, it could not be successfully contended that there was no liability whatsoever in this case, since the Government of Chile has, in her diplomatic correspondence, expressly admitted some liability, and therefore since a decision that the United States had no right to intervene in this case would in effect be under this protocol a decision that the claimants were entitled to no compensation whatsoever, it would be impossible to render such a decision and at the same time comply with the terms of submission. It will be recalled, as was pointed out by the Government of the United States in its Case (pp. 270–314), that the Government of Chile has over and over again recognized, not only in its diplomatic correspondence and negotiations with Bolivia, but with the Government of the United States also, that the claimants are entitled to some compensation, and it has over and over again promised to make such compensation. Moreover, the treaty of 1904 between Chile and Bolivia, which is regarded by the Government of Chile as establishing its obligations in the premises, specifically provides for the liquidation of this debt. The Government of Chile stands in its case upon that treaty, and invoking its limitations must be bound by its obligations. It must therefore be regarded as admitted by the Government of Chile that some liability exists and that some compensation is due the claimants; and that therefore the one question which in any view can be regarded as before His Majesty is the question of the amount of compensation, with the question of liability for some amount standing admitted.

This conclusion regarding Chile's liability for some amount is placed beyond controversy by the admission made in the Case of that Government (p. 2) in which it is stated that—

> "Chile also denies that she has succeeded to any obligations of Bolivia to Alsop & Co., *except so far as she may have agreed by a certain treaty of 20th October, 1904, made with Bolivia, to meet the obligations of Bolivia, and to the extent only imposed upon her by that treaty.*"[a]

Moreover, the correspondence passing between the Governments of the United States and Chile shows that this question of the right of the United States to intervene in this case was from the very first eliminated from among the questions which the Government of the United States would consent to arbitrate.

In his report to the Department under date of September 27, 1909, the American Minister at Santiago made the following statement:

> "On fifteenth (September) Department's draft of protocol was submitted; *on twenty-second Minister for Foreign Relations submitted draft making the right of the United States to support the claim diplomatically a question to be arbitrated. I told him that this would be certainly unacceptable. Chilean Government now yields this point and accepts with a few immaterial changes numbered articles Department's draft.*"

The Department replied to this, under date of October 1, with an instruction setting forth the definitive attitude of the American Government upon this question—an attitude which was never relinquished by this Government and which it was understood was accepted by the Government of Chile and incorporated in the protocol of December 1, 1909. The instructions sent by cable on October 1, paraphrased, are as follows:

> "*The Department can not consent to any modification which would directly or indirectly make an issue of the right of the Government of the United States to intervene in this case. The question to be arbitrated is whether the Government of Chile is liable for injuries suffered by Americans, and that question must be arbitrated broadly on its merits as a claim of American citizens, and can not be arbitrated on the narrow technical ground of the Chilean registration of the partnership. Any changes which seek to make recovery depend upon the question of the registration of the partnership is unacceptable as defeating an arbitration on the merits. The Government of Chile appears to have recognized the rightfulness and justice of this position by admitting your contention that the Government of the United States could not consent to arbitrate the rightfulness of its diplomatic espousal of this case.*"

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[a] Italics inserted.

This cable sets forth the position which the Government of the United States steadfastly maintained during the entire negotiation, and it was always insisted that the acceptance of this principle by the Government of Chile was the *sine qua non* to a settlement of the case by arbitration. This position was definitely and specifically reiterated to the Chilean Government as late as November 21, nine days before the signing of the present protocol of submission, in a note addressed by the Secretary of State to the Minister of Chile at Washington, in which the Secretary of State said:

> "MY DEAR MR. MINISTER: Your oral representations of three o'clock have been fully explained to me. Realizing that so few days remain for the settlement of the Alsop case that every hour is valuable and also keenly appreciating the grave bearing of this controversy upon the relations of the two Governments, I have again laid the matter before the President and hasten to make the following remarks:
>
> "At the very opening of Mr. Dawson's negotiations he made clear and the Chilean Minister for Foreign Affairs understood and conceded that the Government of the United States could never permit to be questioned its right to intervene diplomatically in this case for and in behalf of the original American claimants, their heirs and representatives—a right in fact recognized by Chile through many years of futile negotiation.
>
> "The position of the United States upon this point being exceedingly familiar to the Chilean Government, it would seem quite incomprehensible if the Chilean Government had for a moment supposed that the simultaneous exchange of notes was anything other than an absolute condition to the acceptability of the protocol and a most necessary part of the settlement of the case by arbitration.
>
> "In a desire to restore relations of respect and confidence between the two Governments, the Government of the United States has been at all times and to-day continues to be willing to adopt the formula most convenient to the Chilean Government, but the Chilean Government can hardly expect the United States to abandon at the last moment a position the recognition of which was at the basis of the negotiations now coming to an end.
>
> "In the desire of the President and this Government to conform so far as possible to the wishes of Chile, I shall instruct the Chargé d'Affaires at Santiago, through whom these negotiations are proceeding, to offer to elide from the notes the words "not to mention nor bring before the tribunal," so that the phrase shall read, "The Government of Chile declares that it will not make an issue before the tribunal of the question of the right of the United States to intervene diplomatically in behalf of this claim." It would indeed be sufficiently acceptable to the United States even if this statement were instead included in the protocol itself, but it is unnecessary to explain to you that

in making this concession to the dispositions of the Chilean Government I must insist that the clear meaning of the statement be not obscured or rendered ambiguous by any additional phraseology.

"I must correct one misunderstanding made evident in your statements this afternoon. The mention of $1,000,000 as the irreducible minimum which this Government could think of asking the claimants to consider had no relation to my estimate, well known to your Government, that $3,500,000 were approximately the actual damages of the American claimants, and it could not consequently represent the sum likely to be fixed by a tribunal of arbitration.[a]

"A copy of this letter will be quoted in instructions telegraphed to-night to the Chargé d'Affaires.

"It is utterly impossible for me to consider anything but a continuance of the negotiation for the remaining days precisely upon the basis thus placed before your Government.

"I am, my dear Mr. Minister,

"Yours, very faithfully,

"P. C. KNOX."

Finally, the Government of the United States suggests for consideration, as a precedent upon the point that under the wording of the protocol of submission the question of the right of intervention is not before the *amiable compositeur*, but only the question of the amount to be paid by Chile, the terms of submission in the case of the Delagoa Bay Railway Company. In that case it was provided in the protocol signed on June 13, 1891, by the

[a] A word of explanation should be made regarding the sum of $1,000,000 named in this note. In the course of the negotiations between the Governments of the United States and Chile leading to the protocol of December 1, 1909, a point was reached, owing to certain difficulties which had arisen, at which the Government of the United States regarded it necessary to indicate to the Government of Chile that in view of all the facts and circumstances attending the negotiations, it appeared to be incumbent upon the Government of Chile either at once to pay the claimants some substantial percentage of the amount actually due them (and in this connection the Government of the United States suggested $1,000,000 as "the irreducible minimum which this Government could think of asking the claimants to consider") or to sign a protocol submitting the matter to arbitration upon its merits as to the full amount due under the contract. The Government of Chile chose the latter course. In naming the sum of $1,000,000 the Government of the United States had, as the Secretary of State declares, no thought of fixing or indicating the value of the claim, which, as was well understood at that time, was very much greater than the sum named; but, on the contrary, desired merely to name a minimum which, in a spirit of friendly compromise and in order to avoid diplomatic difficulties of a serious nature, it was willing to recommend to the consideration of the claimants. This offer obviously lapsed when the Government of Chile declined to accept it and chose rather to arbitrate the amount due on the merits.

Governments of the United States and Great Britain on the one side and the Government of Portugal on the other that—

> "The question which the three Governments have agreed to refer to the arbitration tribunal is, to fix, as it shall deem most just, the amount of compensation due by the Portuguese Government to the claimants of the two countries * * *."

Accordingly, the commissioners in rendering their decision, after quoting the passage above set forth, proceeded at once to specify the amount of compensation which was due the nationals of the countries concerned. No argument was made in the award regarding the initial question as to the right of Great Britain and the United States to intervene in behalf of their citizens under the peculiar circumstances of this case, which question seems to have been acknowledged by Portugal when she submitted, under the peculiar terms of the protocol, the question of the amount of the compensation only. This was the view held by Messrs. Lyon-Caen and Renault, who as counsel for the claimants insisted that the Portuguese Government had agreed to submit to the arbitrators the determination of the "amount of compensation due" for the withdrawal of the concession, and had thus admitted that compensation was due for its withdrawal. The Government of the United States submits that this is the situation in the present case.

Second. *The well-established and recognized rules of international law sanction the intervention of the Government of the United States in behalf of its citizens under the circumstances of this case.*

But even if the contention above set forth regarding the issues before His Majesty were not well founded in law or in fact, still the result would be the same, since under the rules of international law the Government of the United States may properly intervene in behalf of its citizens under the circumstances in this case.

There are two classes of cases which may be cited in support of this proposition: (A) Those relating to partnerships in cases governed by the civil law where, as in Chile, such partnerships constitute for the purpose of their commercial dealings legal entities; and (B) Those relating to corporations of the ordinary kind and formed under the provisions of the civil law.

(A) *Partnerships.*—There are a number of cases in the books decided by various arbitration commissions in which the principle has been expressly recognized, invoked, and acted upon, that members of a partnership, which under the local law constitutes a legal

entity, do not by becoming members of such firm deprive themselves of their legal status as nationals of the country to which they belong, nor do they lose any right to protection which they may have as such nationals merely because the injury inflicted affects their interest in the partnership property. Among those cases to which attention might be called in support of this contention are the following:

(1) The case of *Eugene Rochereau* v. *The United States*, before the French and American Claims Commission of 1884. (Case No. 220, Boutwell's Report, p. 124.)

The claimant in this case was a member of the firm of Eugene Rochereau & Co., composed of Eugene Rochereau, Albin Rochereau, and Wm. T. Hepp. The firm was a New Orleans firm and therefore must have constituted a legal entity under the provisions of the civil law, which prevails in that jurisdiction. The claimant in this case, who resided in France, sought to recover his proportion of certain assessments made upon the firm by Generals Butler and Banks in 1862–63, after the Federal forces secured control of New Orleans, upon bonds which had been issued by the municipality of New Orleans for the purpose of securing funds to protect the city against the Federal forces, some of which bonds had been purchased by Eugene Rochereau & Co. If the contention of Chile in the present case is correct, the claim should have been dismissed by the commissioners, since, being an American firm and possessing a legal entity, neither it nor any of its members could have secured an award against the United States. The commission, however, held to the contrary, and while denying to those members of the firm living in the United States any compensation for loss of partnership property (*but on the ground that they were giving aid and comfort to the enemy*), they made an award in favor of the claimant, Eugene Rochereau (the Frenchman residing in France), for his share in the partnership property which had been taken by Generals Butler and Banks. The treaty under which the Commission sat provided for the consideration and disposal by the Commission of "all claims on the part of corporations, companies, or private individuals, citizens of the United States, upon the Government of France," and of "all claims on the part of corporations, companies, or private individuals, citizens of France, upon the Government of the United States"—the classes of claimants being described precisely as in the claims convention of August 7, 1892, between the United States and Chile.

It is not without significance to note that, notwithstanding this case was brought to the attention of the Chilean Claims Commission, the commissioners rendering the majority decision neither commented upon nor made any reference to it whatever.

The Cerruti Case.—The facts and circumstances of the Cerruti case, as set forth in the majority opinion of the American-Chilean Claims Commission dismissing the Alsop claim for want of jurisdiction, are as follows:

> "The principal case cited is the notorious Cerruti claim. In this case the whole property of the firm of Cerruti & Company, a society *en comandita simple* of Colombia, was confiscated or destroyed by the government of Colombia on the alleged ground that one of the members of the firm, Cerruti, an Italian citizen (who was owner of practically the whole partnership property), had violated neutrality during a revolution in Colombia. In addition to the confiscation and destruction, great outrages, including imprisonment were heaped upon Cerruti, and the situation finally grew so acute as to cause a cessation of diplomatic relations between Italy and Colombia. Finally, the Government of Colombia entered into a convention to settle once and for all this matter, which had been for years a matter of constant irritation to the two governments, and had kept their relations strained. As Calvo says (Int. Law, vol. 3, p. 426): 'This case presents this particular feature, that the contending parties came to an agreement to prepare a compromise or a preliminary convention in which they settled the points on which the mediator should pass.' Thus, when 'the matter of the arbitration of the claim of the Government of Italy (Cerruti was *not* the claimant) against the Government of the Republic of Colombia' was presented to the arbitrator, Grover Cleveland, it had already been settled by the preliminaries that Colombia admitted that in the movable and immovable property and credits to be returned to Cerruti should be included those which constituted the property of the firm of Cerruti & Company. (See questions regarding the preliminary bases of the negotiations for settling the Cerruti question between the Italian Minister of Foreign Affairs and General Posada, of Colombia; Italian Green Book, March 13, 1900.)
>
> "At first objection was made by Colombia to the effect that E. Cerruti & Co., being a society *en comandita colectiva* [simple?] having a juridical entity, was, in fact, a Colombian citizen, and therefore that no indemnity could be demanded by Cerruti personally for damages sustained by the property of Cerruti & Co. This position was practically abandoned, for Colombia had, in equity at least, forfeited the right to such a position by injuring Cerruti, for political and individual reasons, not only in all his private interests, but also in all his interests in the partnership property as well.
>
> "Furthermore, there was vested in the arbitrator, Grover Cleveland, 'full power and authority and jurisdiction to do and perform and cause to be performed all things *without any limi-*

tation whatsoever,' and this fact is twice mentioned by the arbitrator in his award.

"The Cerruti case, therefore, was peculiar and unique, one of acute international complication, in which the preliminary questions had been discussed for years, and in which, also, the jurisdiction of the arbitrator was not restricted, as in this case, but was without any limitation whatsoever. (App. II, Case of the United States, pp. 567, 568.)

It is perhaps unnecessary to do more, in commenting upon the present case, than to point out that it now meets all of the requirements to make it, like the Cerruti case, "peculiar and unique." The Alsop case also became one of "acute international complications, in which the preliminary questions were discussed for years," and it is now submitted to arbitration under a protocol in which the jurisdiction of the arbitrator is not restricted, the case having been submitted to him without any limitation whatsoever for determination upon the broad equities that may be found to exist.

One word, perhaps, might be added regarding the meaning of the words of the Cerruti protocol to which the Commission called such particular attention, namely, that the arbitrator in that case should have "full power and authority and jurisdiction to do and perform, and cause to be performed, all things *without any limitation whatsoever.*" It might be inferred from the manner in which these words are cited by the Commission that that body understood that they were words of jurisdiction as to the matter of the examination of the case and the award thereon. The full text of the provision from which this quotation is made reads as follows:

"As soon as the arbitrator by his acceptance of the office shall have qualified himself to enter upon his functions, he shall become vested with full power, authority and jurisdiction to do and perform, and to cause to be done and performed all things without any limitation whatsoever, which in his judgment may be necessary or conducive to the attainment, in a fair and equitable manner, of the end and purposes which this agreement is intended to secure." (Moore's Int. Arb., vol. 5, p. 4700.)

It is quite evident from the wording of this provision that it related not so much to the question of the legal jurisdiction of the arbitrator, as that question affected the nature of the questions which he was to determine, as it did to extending to him powers by which he might provide for the carrying out of his award. This view finds confirmation in the fact that while in the award which the arbitrator made he adjudged to Colombia the rights possessed by the claimant to certain property, yet on the other hand the arbitrator required Colombia to guarantee the claimant

against liability on the partnership debts and to reimburse him for disbursements and expenses upon that score. To this part of the award Colombia objected, maintaining that the powers of the arbitrator were limited to the award of specific indemnity on international claims and that he was equally precluded from dealing with any matter cognizable by the Colombian courts or from imposing any contingent liabilities upon the Government of Colombia. (Moore's Int. Arb., vol. 2, p. 2122.)

Colombia, however, finally gave effect to the award in its entirety.

The clause in the agreement extending jurisdiction as to the matters of law and the principles involved immediately follows the one quoted and reads as follows:

> "And he shall thereupon proceed to examine and decide according to the documents and evidence that may be submitted to him by each of the two Governments or by the claimant as one of the two parties interested in the suit, and the principles of public Law, First, which, if any, among the said claims of Sig. E. Cerruti against the Government of Colombia be a proper claim or claims for international adjudication; and, Secondly, which, if any of the said claims of Sig. E. Cerruti against the Government of Colombia be a proper claim or claims for adjudication by the territorial Courts of Colombia. And respecting the claim or claims, if any, which in the judgment of the arbitrator shall have the character of, and belong to, the first class of claims above defined, the arbitrator shall proceed to determine and to declare the amount of indemnity, if any, which the claimant Sig. Cerruti be entitled to receive from the Government of Colombia through diplomatic action." (Moore's Int. Arb., vol. 5, p. 4700.)

It will be observed from this that the protocol of the Cerruti case expressly stipulated that the questions before the arbitrator for decision were the questions of the liability under the rules and principles of international law; that there was absolutely nothing conceding upon the part of the Government of Colombia that the Government of Italy had any right to intervene in this case because of the nationality of the firm to which Cerruti belonged, and that on the contrary that question must have been before the arbitrator; and that having this question before him the arbitrator held that under the principles of international law the Italian members of a Colombian commercial firm having an existence as a legal entity had a right to the intervention of his home Government and was entitled to receive an award for damages to partnership property in proportion to the extent of his interest therein.

(*B*) *Corporations.—The Delagoa Bay Case.*—This is one of the best known of the cases in which governments have intervened

for and in behalf of their own nationals who were merely stockholders or bondholders in foreign corporations, the intervention being directed against the government under whose laws the corporation had been formed, such corporation being a juridical entity having the nationality of such government.

In this case one MacMurdo, a citizen of the United States, secured from the Portuguese Government a concession to build in South Africa a railroad from Lourenço Marquez to the frontier of the Transvaal. The concession stipulated that MacMurdo should form a company under the laws of Portugal for the construction and operation of the railroad, and this was accordingly done. MacMurdo thereupon assigned his concession to the company, receiving as consideration therefor practically all of the stock of the Portuguese company and all of the debenture bonds, amounting to some £425,000. After a number of years of unsuccessful effort to float the bonds, MacMurdo interested some English capitalists in the undertaking and organized an English company known as the Delagoa Bay and East African Railway. MacMurdo assigned his shares and bonds of the Portuguese company to the English company, the latter company giving therefor all the stock of the English company and paying MacMurdo £115,500 in addition, the company thereupon issuing debenture bonds to pay MacMurdo and to raise money to build the road. The road was completed and accepted by the Portuguese Government, but difficulties arising regarding an extension which that Government declared should be built, the road was confiscated by Portugal. The representatives of MacMurdo appealed to the American Government and the British interests appealed to the British Government for protection. Any intervention in the case therefore would, it is obvious, be for the protection of American and British stock and bond holders in a Portuguese corporation, such intervention being against Portugal.

Upon the matter being called to the attention of the Portuguese Government, that Government expressed its views upon the question in certain communications addressed to the British Minister at Lisbon, said communications bearing date of June 26 and July 1, 1889.

In the note dated June 26, 1889, Señor Barros Gomes, the Portuguese Minister for Foreign Affairs, made the following statements upon this point:

> " I must not conclude without calling your Excellency's attention to the fact that in yesterday's note, with reference to the extension of the term, allusion is made to the 'Delagoa Bay

> Railway Company.' The Portuguese Government do not officially recognize as interested in the matter in question any other body than the Joint Stock Limited Liability Company, having its seat in Lisbon, called 'The Lourenço Marques and Transvaal Railway Company.' It is true that this Portuguese Company made a contract with another English Company, called 'The Delagoa Bay and East African Railway (Limited),' for the construction of the line. As regards the fulfillment of the conditions of the Contract between the two Companies, they are mutually responsible to each other; but as regards the fulfillment of the clauses of the Contract for the Concession, the only Company which is responsible to the Portuguese Government, and the only one which can be officially recognized by the Portuguese Government, and with which they have to treat, is the Portuguese Company." (British State Papers, vol. 81, p. 685.)

In the Portuguese Minister's note of July 1, 1889, he commented upon the same point as follows:

> " In reply, I beg to call the attention of your Excellency and of your Government to the fact that, inasmuch as the Company is a Portuguese Company, that it has its seat in Lisbon, and that it is, for all intents and purposes, subject to the laws of Portugal, the Company will find sufficient protection in those laws, in which, as well as in the several clauses of the Contract, it possesses the necessary means in order to enforce its rights.
>
> " The Directors of the Company have so far acknowledged this that, although they have protested against the decision taken by the Government, they declared that they would send orders to their agents at Lourenço Marques not to offer any resistance to the taking possession of the railway by the Government, who were about to do so. It is true that, in spite of this, in the beginning an attempt at resistance was made, but it was easily overcome, and the authorities at Lourenço Marques are already in full and peaceable possession of the railway." (British State Papers, vol. 81, p. 687.)

The reply of the British Government upon this point is contained in an instruction by the Marquis of Salisbury to Mr. Petre, the British Minister at Lisbon, under date of September 10, 1889, in which his lordship made use of the following language:

> "Senhor Barros Gomes in his notes of the 26th June and 1st July, while admitting the right of Her Majesty's Government to advocate on just grounds the claims of British subjects, contended that in this case such advocacy was not needed, as the Portuguese Government had no concern with the English Company, and he asserted that they could only recognize the Portuguese Company, which had the power of appealing for protection to the laws of Portugal.
>
> "If this contention were admitted the interests of the British Company would be at present absolutely unprotected, for the Portuguese Company, after submitting, under protest, to a decision which it felt itself incapable of resisting, has, for all

practical purposes, ceased to exist. But Her Majesty's Government consider this view to be altogether untenable. Senhor Barros Gomes must, indeed, in advancing it have forgotten the circumstances which attended the establishment of the British Company." (British State Papers, vol. 81, p. 688.)

To this contention of the British Government the Portuguese Government, in a note dated November 13, 1899, made the following response:

"I propose to reply in succession to these several points, which have been most accurately abridged from Lord Salisbury's note in question, as briefly, but also as precisely, as possible:

"1. It is incorrect to suppose that the Portuguese Lourenço Marques Railway Company has ceased to exist. The dissolution of anonymous Companies, whether it be of their own accord or by force, is subject to precise conditions which are set forth in the Laws and in the Statutes of those Companies. As regards the case in point, let reference be made, amongst other provisions, to Article 29 of the statutes of the 30th December, 1885, to Article 44 of the Law of the 22nd June, 1867, and to Article 122 of the new Commercial Code of the 22nd June, 1888. Now, not a single one of these conditions has, up to the present, been verified as regards the Portuguese Lourenço Marques Railway Company. It is evident, therefore, that the Company, on the one hand, did not make use of the power conferred upon it by law of dissolving of its own accord, and, on the other hand, it can not be held to be legally extinct by the sole fact of the Decree of the 25th June having rescinded the Contract of the 14th December, 1883.

"His Majesty's Government have always entertained this conviction. I have more than once had occasion to assert in their name to your Excellency, both in writing and *vivâ voce*, that the Company had the power to appeal to a Court of Arbitration from the provisions contained in the Decree of the 25th June last; and it is a notorious fact that, by that Decree, His Majesty's Government ordered an inventory to be taken of the line in the presence, as is expressly laid down, of the representative or representatives of the Company. And, moreover, His Majesty's Government would never have made through me to your Excellency the declaration to which I allude, nor would the Decree of the 25th June have been worded as it was, were they not fully convinced that the Company is actually in existence.

"It is true that Lord Salisbury's despatch only declares the Company extinct for all practical purposes; but not even from this strict point of view is the noble Lord's assertion justifiable. As regards the Decree of the 25th June, up to the present the Company has done no more than protest against what it supposed to be the unjust provisions of the Decree. This is true. But that very protest is an evident sign that it did not look upon itself as extinct, and there is nothing to prevent it from still appealing, as I said, to the Court of Arbitration, the constitution of which, in accordance with Article 53 of the Contract,

insures the greatest impartiality to the parties to the suit. The Delagoa Bay Company, which owns at present almost the whole of the shares of the Portuguese Company, is in a position to contribute in the most decisive manner towards the carrying into effect of this perfectly legal appeal. The supposition, therefore, that the interests of the Company are unprotected is absolutely groundless, on which supposition it thought, as may be presumed, that it was placed under the unavoidable necessity of having recourse to diplomatic intervention. The defence of those interests was, and still is, placed in the hands of those who can better and are, moreover, obliged to protect them, that is to say, the Company itself. In the Contract, from which His Majesty's Government have never swerved, except for the purpose of generously favouring the Company, as will hereinafter be amply proved, in the laws of Portugal and in the good-will of His Majesty's Government, of which they have invariably given it the most decisive proofs, the Company would have found, and will still find, more than sufficient means for the effectual defence of the interests which it represents.

"It behooves me here to add that His Majesty's Government have taken so much care of the interests which are presumed to be unprotected that they ordered, in accordance with the Contract of 1883, that the amount received for all the materials and stores, and for the works and buildings, &c., which must be sold under the conditions and in the terms set forth in the Contract, shall be delivered to the Company, after deducting the expenses incurred, and nothing more. The proceeds of this liquidation will have to be applied in due form to the payment of those who, either in virtue of their contracts with the Company or by the fact of holding shares, have interests in the undertaking or have invested their capital in it. The claimants might have a shadow of a reason in the hypothesis that no bidders would appear at the public sale, inasmuch as in that hypothesis (*vide* § of Article 42 of the Contract) the works, materials, and stores would revert to the State, which would not be bound to compensate them. But such an hypothesis is inadmissible. The claimants themselves acknowledge it to be absurd, in view of their calculations as to the probable receipts of the railway. Should it, however, occur, it would then become opportune to inquire whether it would be equitable for the State to make full use, irrespective of any consideration whatsoever, of the rights which it reserved (and which can not be contested) in the aforesaid § of article 42." (British State Papers, vol. 81, 694–696.)

The general course of the American negotiations has been set forth by Mr. Moore as follows:

"The first step of the Government of the United States toward intervention in respect of the Delagoa Bay Railway was taken in May 1889, on the 9th of which month Mr. Blaine, as Secretary of State, instructed Mr. Lewis, then minister of the United States at Lisbon, to send to the Department of State all the documents relating to the grant by the Portuguese Government to

Edward MacMurdo, a citizen of the United States, of the concession for the construction and operation of the railway. On the 19th of the next month Mr. Blaine further instructed Mr. Lewis that it was reported that the Portuguese Government intended to take possession of the railway on the 24th of June; and he expressed the hope that no decisive action might be taken till the Government of the United States could investigate the case and make known any objections it might desire to express. At the same time he reserved all the rights of the United States in the matter. In due time Mr. Blaine was informed that the concession had been canceled. He then directed Mr. Lewis to enter a formal protest, reserving all rights which the heirs of Mr. MacMurdo, who had then died, or other American citizens, might have in the concession; and he subsequently instructed Mr. Loring, who had succeeded Mr. Lewis as minister at Lisbon, to inform the Portuguese Government that the United States, after careful investigation, viewed the forfeiture of the concession and the confiscation of the railway as unwarranted and unjust.

"Coincidently with the making of these representations to the Portuguese Government, Mr. Blaine caused Mr. Lincoln, then minister of the United States in London, to inform the foreign office that the Government of the United States would actively cooperate with that of Her Majesty to secure the respective rights of the American and British investors and stockholders who had been injured by the action of the Portuguese Government in relation to the railway. Lord Salisbury expressed gratification with this offer, and gave Mr. Lincoln a copy of his instructions to the British minister at Lisbon of September 10, 1889, containing the demand of Her Majesty's government upon Portugal. On the 8th of November Mr. Blaine dispatched to Mr. Loring the following instructions, setting forth the conclusions of the United States on the subject in controversy:

"'DEPARTMENT OF STATE,
"'*Washington, November 8, 1889.*

"'SIR: Referring to previous correspondence on the subject of the seizure by the Portuguese Government of the Delagoa Bay Railway, I have now to acquaint you with the views which this government, after careful consideration of the facts, has reached on that subject.

"'On December 14, 1883, Edward MacMurdo, a citizen of the United States, received from the Portuguese Government a concession for the construction of a railway from the port of Lourenço Marques to the frontier, between the territory of Portugal and the Transvaal. The line of the railway so to be constructed and its extent were subsequently defined by plans approved by the Portuguese Government on October 30, 1884.

"' In accordance with the provisions of his concession, Colonel MacMurdo at once proceeded to form a company for the construction of the railway, which bore the title of the Lourenço Marques and Transvaal Railway Company, and was organized in Portugal. This company after several extensions of time was unable to procure funds with which to complete the contract,

and Colonel MacMurdo then sought to obtain the necessary capital in England. His efforts in that direction resulted in the formation in London of the Delagoa Bay and East African Railway Company, and under the auspices of this organization the funds required for the completion of the railway were secured. In these various transactions Colonel MacMurdo, who remained all through, as the original concessionaire, a responsible party for the completion of the road, took and paid for a large amount of stock and bonds, and his proceedings for the formation of the British company had the approval of the Portuguese Government, the only reservation which it made in regard thereto being that the concession should not be transferred to the British company. With this reservation it was understood on both sides, as appears by the correspondence, that the British company might hold a part or even all the shares of the Portuguese company.

"'The capital was raised and the construction of the road proceeded with, in accordance with the plans approved by the Portuguese Government on October 30, 1884. No intimation of any change in those plans was made until July 1887, on the 24th of which month a plan was presented to the resident engineer of the British company at Lourenço Marques by the Portuguese official engineer, Major Machado, with a letter in which it was intimated that the Portuguese Government required the extension of the railway to a point nine kilometers beyond the limit fixed in the original and approved plans. Inquiries made at the colonial department of the government in Lisbon, on behalf of the British company, elicited the information that nothing was known by that department of any plans other than those which had been approved; and that, if such plans were presented by Major Machado he had not communicated with the government on the subject. Subsequently the Portuguese company also protested against the alleged additional requirement, and in consequence of its protest an extension of time for examination of the subject was granted by the Portuguese Government until January, 1888.

"'In the meantime the railway was completed in accordance with the original plans and accepted by the Portuguese Government, with a reservation of the question as to the further extension of the line.

"'In January 1888 no conclusion had been reached by the government on that subject, and on the 30th of that month the Portuguese minister of marine and colonies wrote to the president of the Portuguese company a letter stating that the frontier between the Portuguese territory and the Transvaal had not been determined; that the failure to do so was due to the refusal of the Transvaal government to agree upon a boundary; that the reason of such refusal was the right which the company possessed under the concession to Colonel MacMurdo to fix its own tariffs; and that whenever the boundary should be determined the Government would have no hesitation in granting a reasonable term for the completion of the line. Subsequently, correspondence took place between the government and the Portuguese company, with a view to induce the latter to accept a

fixed tariff of rates as desired by the Transvaal Government. This effort having been unsuccessful, the Portuguese Government in October 1888 issued a decree fixing the terminal point of the railway at a distance of eight kilometers beyond the terminus set in the original plans, and also fixed a period of eight months, ending on June 24, 1889, for the completion of this extension. Against this decree the Portuguese company, at the instance of the British company, protested, on the ground that it was impossible, owing to physical causes the existence of which was well known, to complete the extension within the time prescribed, and consequently that the decree was inconsistent with the assurance given in the letter of the 30th of the preceding January that a reasonable time should be given for the completion of the line whenever the frontier should be determined. The period prescribed included the whole of the rainy season, which continues from November until May, and the justice of the protest is shown by the fact that notwithstanding every effort of the contractors to complete the extension (their protests having been disregarded) within the time prescribed, difficulties which they could not overcome prevented them from so doing, and among these was the washing away by the heavy rains, in January last, of parts of the extension which had been constructed.

"'When the period fixed for the completion of the extension drew near, this government, having been informed of the facts and of the intention of the Portuguese government to seize the road, on the 19th of June last instructed the minister of the United States at Lisbon, by telegraph, to state to the Portuguese Government that it most earnestly hoped that no decisive action would be taken until the Government of the United States had investigated the case and stated its objections; that instructions would be sent as speedily as possible; and that this government desired to reserve its rights in the matter. A copy of this instruction was communicated to Senhor Barros Gomes on the 19th of June. On the 22d he replied, expressing regret that the decree of seizure must be carried into effect. For this decision reasons were stated which this government is unable to regard as sufficient. At the expiration of the period in question the Portuguese Government annulled the concession, and seized the road and all its appurtenances. This action was taken ostensibly under the forty-second article of the concession, but it was also taken in disregard of the fifty-third article of the same document, which provided that all questions which might arise between the government and the company touching the execution of the contract should be submitted to arbitration.

"'On the 1st of July last, your predecessor was instructed to enter a formal protest reserving all rights which Colonel MacMurdo's heirs (Colonel MacMurdo having died in London on the 8th of May last) or other American citizens might have in the concession. This protest was communicated to Senhor Barros Gomes on the 18th of July last.

"'Upon full consideration of the circumstances of the case, this government is forced to the conclusion that the violent seizure of the railway by the Portuguese Government was an act of

confiscation which renders it the duty of the Government of the United States to ask that compensation should be made to such citizens of this country as may be involved. With respect to the case of Colonel MacMurdo, who is now represented by his widow, Katherine A. MacMurdo, his sole executrix and legatee, it is to be observed that by the terms of the concession the company which he was required to form was to include himself and that his personal liability was not merged in that of the company. But in any case, the Portuguese company being without remedy and having now practically ceased to exist, the only recourse of those whose property has been confiscated is the intervention of their respective governments.

"'In this relation it is proper to advert to the note of Senhor Barros Gomes of the 22d of June last above referred to, in which he stated that there were two ways in which an arrangement could then be made with the Portuguese company which would protect the interests of the share and bond holders. One of these ways was the acceptance by the company of the tariff of rates proposed by the government of the Transvaal; the other, a radical alteration of the concession, which would produce the same result. These statements have the effect of admitting the rights of the company, and of admitting at the same time that the reason for sacrificing them was the desire of the Portuguese Government to effect certain arrangements with the government of the Transvaal. No offer was made to arbitrate with the company, as the concession required. No proposition of arrangement was held out, except such as involved a virtual annulment of the concession. And it was in fact annulled and the property acquired under it confiscated, because the company which Colonel MacMurdo organized under the concession was unable to perform an impossible condition subsequently imposed without the consent and against the protests of that company.

"'I inclose herewith a copy of the petition of Mrs. MacMurdo to this government, in which you will find a statement of her claims. In regard to the amount of these claims this department has formed no definite conclusion, the question of amount being regarded as one for further investigation and proof. This question can readily be determined, the Portuguese Government first agreeing to admit its liabilty to make compensation for the losses occasioned by its forcible seizure of the railway in disregard of the rights of the concessionaire and the owners. This government is desirous of reaching an early and amicable settlement of the case, and hopes that the Portuguese Government will be disposed to repair the injuries which its action has produced.

"'You are at liberty to read this instruction to Senhor Barros Gomes and to leave with him a copy of it, if he should so desire.

"'I am, etc.,

"'JAMES G. BLAINE.'

* * * * *

"During the early part of 1890 various propositions were considered. The Government of the United States, while desiring a direct settlement of the matter, insisted that if arbitration should

be adopted the submission should be in such form as to secure a decision 'on the merits and not upon such terms and conditions as will by any inference, however remote, admit the rightfulness of the seizure of the railway.' In the event of an agreement to arbitrate, the United States expressed a willingness 'to have an arbitrator selected either from Sweden, from Switzerland, or from another neutral State.' The negotiations were finally directed to the end of securing an arbitration, and the Portuguese minister for foreign affairs having desired the Government of the United States to make an ultimate statement of its views, Mr. Blaine early in April 1890 directed Mr. Lincoln to confer with Lord Salisbury as to what steps the British Government proposed to take, and as to whether they would follow the action of the United States. Lord Salisbury happened at the time to be in France, but it was ascertained that Her Majesty's Government had not decided what action they would take, and that they would like a suggestion from the United States of a joint plan of action. The Government of the United States stated that it would accept nothing less than an international arbitration of the real merits of the case, and the British minister at Lisbon was instructed 'to support the view of the United States.' It was subsequently agreed, on the proposition of Mr. Blaine, that the individual arbitrators should be named by some neutral nation or nations, and not by any of the interested powers, to ask the Government of Switzerland to select three eminent Swiss jurists to determine, as international arbitrators, the indemnity due from Portugal for the annulment of the charter and the taking possession of the railway. Mr. John D. Washburn, minister of the United States at Berne, was instructed to confer with his British and Portuguese colleagues and to unite with them in identic notes to the Swiss Government for that purpose. On August 13, 1890, identic notes were, in accordance with this plan, addressed to the President of Switzerland.

"In these notes the matter to be arbitrated was clearly defined as 'the question of the amount of compensation, which is due by the Portuguese Government, in consequence of the latter having rescinded the concession of the Delagoa Bay Railroad Company and of their having taken possession of the railroad.'" (Moore's International Arbitrations, vol. 2, p. 1865 et seq.)

This arbitration resulted, as already pointed out above, in an award to the British and American interests involved. It will be perceived from the above discussion that the intervention on the part of Great Britain was for and in behalf of the English company owning the stock and bonds of the Portuguese company, which Portuguese company owned the concession and the railroad which had been confiscated by the Portuguese Government; and that while the English Government stated that the Portuguese company had, "as a practical matter, ceased to exist," the Portuguese Government insisted that the contrary was true and that the Portuguese company was in a position duly to

enforce its various rights under the contract. The intervention by the American Government in behalf of the American interests involved was under one aspect for interests even more remote from the American Government than were the British interests from the British Government; that is, from the statement of the facts made above, it would appear that intervention, at least in part, was made for and in behalf of an American citizen owning stock and bonds in an English corporation, which English corporation owned the stock of a Portuguese corporation, which latter corporation owned a railroad which had been confiscated by the Portuguese Government.

Both the British and the American Governments seem to have based and justified their intervention upon the proposition that the Portuguese company had, as it was stated, as a practical matter, ceased to exist, an allegation which, from the facts stated, would seem to constitute an accurate statement of the situation, notwithstanding the contention of the Portuguese Government that the mere legal Portuguese entity still existed. This view finds support in the fact that the railroad had been given up, the company had been forced to yield to the contentions and acts of the Portuguese Government, and that there was, as a matter of fact, little left of the concession except such broad equitable rights as might be found to exist in favor of those persons who had put into the enterprise their money, which money had by reason of the actions of the Portuguese Government been dissipated and lost.

This could all be alleged and proved in the present case, even if the most favorable construction should be placed upon the contentions set forth by the Government of Chile. Admitting, for the sake of argument, that the organization of the firm in Chile made of it a Chilean legal entity, still it should be borne in mind that that entity was formed but for a limited time; that the articles of copartnership specify the time and the manner in which the partnership should be dissolved; that in accordance with the terms of the partnership agreement notice of the termination of the firm life and activities was in due course and time given to the parties interested; and that the business of the firm was wound up, save as to the collection of this one asset and the consequent liquidation of certain of the firm's obligations depending thereon. (See Appendix, p. 28, for notice of dissolution.)

Under these facts, circumstances, and conditions no phrase could be framed which would better describe the condition in

which the firm of Alsop & Co. from December 31, 1873, until the present time than that "as a practical matter it had ceased to exist."

Even, therefore, if we extend to a partnership entity the same attributes which belong to a corporate entity, we still have in this Alsop case a situation which, under the principles announced and acted upon in the Delagoa Bay case, would permit and justify the intervention of the United States in behalf of American citizens interested in this firm.

The El Triunfo Case.—In this case it appears that the Government of Salvador granted for a period of twenty-five years an exclusive privilege of steam navigation to the port of El Triunfo. On October 25, 1894, this concession was assigned to a Salvadorean corporation, the El Triunfo Company (Limited). This company had a capital stock of $100,000 American gold, divided into 1,000 shares of $100 each, of which shares 501 were owned by the Salvadorean Commercial Company, a corporation organized under the laws of the State of California. Difficulties having arisen among the members of the El Triunfo Company, the parties interested had recourse to the courts of Salvador, with the result that the Government espoused the cause of the interests hostile to the American interests in such a way and to such an extent that the American Government intervened for and in behalf of the American corporation which owned a bare majority of the stock in the Salvadorean corporation, which in turn owned the concession which had been practically annulled by the action of the Salvadorean courts. The questions involved were referred to three arbitrators, the Hon. Henry Strong, Chief Justice of the Dominion of Canada; the Hon. Don M. Dickinson, of Detroit, Mich.; and Dr. D. Castro, Chief Justice of the Supreme Court of Salvador. Two of these commissioners, the Hon. Henry Strong and the Hon. Don M. Dickinson, made an award in favor of the American corporation, and awarded to the American company its pro rata share (based upon the number of shares of the stock held by the company) of the value of the concession and of a certain steamer owned by the company, as well as of the value of certain property belonging to the El Triunfo Company taken by the Government of Salvador.

In closing their opinion supporting their award, the two commissioners made the following statement:

> "We have not discussed the question of the right of the United States under international law to make reclamations for these

> shareholders in El Triunfo Company, a domestic corporation of Salvador, for the reason that the question of such right is fully settled by the conclusions reached in the frequently cited and well-understood Delagoa Bay Railway Arbitration." (For. Rel. U. S. 1902, p. 838 et seq.)

Whatever the law may have been prior to the decision of these two cases, there can be no doubt whatever but that it has come to be the practice of nations to intervene under appropriate circumstances and conditions in behalf of their nationals, owners of stock in foreign corporations, and it is no reply to such proposed intervention, as the precedents show, to contend that the corporation in which such nationals own stock constitutes a juridical entity for certain purposes, with the status of a citizen or subject of the country in which it is organized. His Majesty will readily recall that there are at the present time pending a number of cases in which the United States and Great Britain are joining in a diplomatic intervention for and in behalf of their citizens who are similarly situated.

The Government of the United States wishes, however, to emphasize the fact that whether or not it might be considered that the corporation cases are in point, there can be no doubt whatsoever but that the partnership cases hereinbefore cited—that is, the case of *Rochereau* v. *The United States* and the *Cerruti case*—are wholly in point in all their parts and that particularly the *Cerruti case*, the full scope and effect of which was completely recognized by the United States and Chilean Claims Commission of 1901 in connection with the Alsop case, is a clear precedent on all fours with the present case. It must, therefore, be regarded as clearly established that the right of the Government of the United States to intervene in behalf of the American claimants in the Alsop case is placed beyond all question or dispute.

Exhaustion of Legal Remedies.

Statement of Chilean Case.

> "Chile therefore was not indebted to Alsop & Co., which was a purely Chilean firm, and Alsop & Co. can not complain of any denial of justice, since they never attempted to assert a legal claim against the Government of Chile." (Chilean Case, p. 7.)
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> * * * * *
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> "According to International Law foreigners are subject to the laws of the country in which they reside in the same way as natives, and consequently, when a foreigner has rights to claim or damages to enforce

against a State, he must resort to the judicial or administrative authority thereof, and the State to which he belongs can only protect him diplomatically after all his legal remedies are exhausted.

"The United States has recognized the force of this principle in numberless cases, whether as Claimants or the reverse; and has recommended her agents, in cases of this kind, to respect the laws and authorities of each country.

* * * * *

"In accordance with this fundamental principle of International Law, if those interested in the Alsop claim had rights to enforce against the Government of Chile they ought to have addressed themselves to the Courts of Justice having the necessary jurisdiction." (Chilean Case, p. 13).

It is a matter of regret to have again to observe that the Case of the Government of Chile fails in respect to this point, as with respect to other points, clearly to define the position which the Chilean Government intends to take upon the question of the exhaustion of legal remedies—that is, whether it is intended to set forth in the Case of the Government of Chile that Alsop & Co. or the claimants have not exhausted their legal remedies, and that therefore an award is not to be made in this case, or whether it is intended merely to set forth that the Government of the United States in intervening in this case did so contrary to the principles of international law, at the same time having no intention to contend that this fact is a bar to an award in this case.

The Government of the United States, while contending, as will be more fully set forth below, that it has in no way violated the principles of international law in its dealings with this case, now submits that either phase of this question is, in this case, immaterial, and, further, that it is not before His Majesty for consideration or determination. As already pointed out and discussed, the question submitted to His Majesty for determination is the pure and simple question of the amount which, under all the facts and circumstances of this case, is equitably due the claimants. All questions involving matters of jurisdiction have been waived by both parties under the protocol of submission. Even, therefore, were it a fact, as the United States contends it is not, that the claim of Alsop & Co. might under certain circumstances and conditions be subject to the objection that the claimants had not exhausted their legal remedies, still that question would not be open for adjudication in the present case, and it would be incumbent upon His Majesty to determine as to the amount

equitably due, irrespective of the question whether there had been an exhaustion of legal remedies resulting in a denial of justice.

The Government of the United States desires, however, to submit in a brief argument that even were the question before His Majesty, still it must be found that the remedies in this case had been exhausted where it might be regarded necessary that they should be so exhausted. Upon this point the two distinct phases of the Alsop Claim must be kept in mind—that is, the claim in tort and the claim for the concessionary debt.

As to the first, the tort claim, it should be observed that John Wheelwright did go into the courts of Chile and that he there made a careful and painstaking effort to secure the recognition of his contract rights and that those courts ignored his rights under the contract and gave judgment against him. (Case of the United States, pp. 111–231.) How numerous were the times that Wheelwright applied to the courts for the protection of his rights, and how uniformly he was told as the result of such appeals that he had no right to the mines which he sought, will doubtless be entirely clear to His Majesty should it be considered necessary to examine the "pleadings presented by Alsop & Co. which Chile places at the disposal (if required) of the Royal Arbitrator." (Chilean Case, p. 28.)

These decisions of the Chilean courts, of which specific complaint have been made in the Case of the United States, deprived, as will be recalled, Wheelwright of two of the most important vested rights which he possessed under the contract, namely, the right to hold, under Chilean rule, as he had held under Bolivian law, the Government estacas free from the liability of denouncement, and, second, the right which he had under Bolivian law of ejecting trespassers from the government estacas of which he had not already taken possession at the time of the outbreak of the war. These were the decisions, so far as can be learned from this distance of time, which resulted in imposing upon Wheelwright and the concessionaries their greatest loss on the tort side of the claim. Had matters gone no further than this there might have seemed to be some color to the contention that the legal remedies as to the tort had not been exhausted. But matters did not stop here. The Chilean executive authorities adopted the interpretation of the law which had been thus given by the courts and carried the same into execution, thus depriving Wheelwright of some of the most valuable mines to which he was entitled in the Bolivian Littoral. Moreover, not only did the Chilean Executive of that time adopt this

ruling of the Chilean courts, but the officers of the executive branch of the Chilean Government, as well as the Government itself, speaking through its Minister of Foreign Relations, have ever since adopted and relied upon this interpretation of the courts, and have invoked such interpretation as justifying their course. In the present Chilean case as now presented to His Majesty these decisions of the courts are invoked with a view to establishing the contention of the Government of Chile that Alsop & Co. suffered no interference with their legal rights, but on the contrary were protected therein.

Therefore, in the face of the fact that nearly thirty years ago the Chilean courts decided that Wheelwright did not have the rights which his contract called for, and that from that date until the present time the Chilean Government has declared that the courts were correct in this determination, the two branches of the Government, the executive and the judiciary, thus concurring, it is difficult to see how it can be successfully argued that there has not upon the tort side of this claim been an exhaustion of the legal remedies.

Moreover, inasmuch as there are invoked in the Case of the Government of Chile certain precedents of the United States with reference to the exhaustion of legal remedies, it may perhaps not be amiss to direct attention to other considerations which have controlled the position of the United States as set forth in the same volumes, where, as in the present case, the Executive itself has taken and maintained a deliberate attitude upon the contract to which it was to a greater or less degree a party. Under such circumstances the Government of the United States has announced and acted upon the obvious principle that "the seizure or spoliation of property at the mere will of the sovereign and without due legal process has always been regarded as, in itself, a denial of justice and has afforded the basis for international interposition." (Mr. Bayard, Secretary of State, to Mr. Buck, Minister to Peru; Moore's Digest, vol. 6, p. 254–255.) The executive branch of the Chilean Government having adopted and acted upon the determination of the Chilean courts, the present case is brought precisely within the principle thus announced by the Government of the United States at that time.

The situation with reference to the contract claim is different. It will be recalled, in the first place, that the original contract of December 26, 1876, was between John Wheelwright on the one side and the sovereign State of Bolivia on the other.

Shortly thereafter the Government of Chile assumed the attitude of sovereign both toward the Littoral, in which were located the mines, and, for several years, toward the Arica customs appropriated by the contract for the payment of the contract debt, and, therefore, so far as the rights under this contract are concerned, that Government must be understood to have assumed toward the rights held by Wheelwright in this matter the same position that had been maintained by Bolivia. It should also be observed that having for three years vainly endeavored to secure from the Government of Chile a recognition of his rights under the contract of 1876 Wheelwright found himself obliged to petition his own Government for assistance upon the entire question. It was at this step of the proceedings that the Government of the United States first made its diplomatic representation to Chile of the claimants' rights under this contract. From that time until the signing of the protocol of December 1, 1909, the matter has been the subject of discussion between the two Governments, and the Government of Chile has repeatedly assured the Government of the United States, which had espoused the case of the claimants and made the claim its own, that the Government of Chile would satisfy this obligation. The claimants have never during this time been invited to seek their remedy through the courts of Chile, for the simple and sufficient reason, first, that the matter was not a private one between the claimants and the Government of Chile, but a matter of diplomatic negotiation between two sovereign States, and, second, that the Government of Chile never before invoked as a bar to the presentation of the claim an allegation that the claimants had not exhausted their legal remedies, but, on the contrary, admitting unquestioned the right of this Government to intervene in the case, has always been promising to pay and always admitting a liability to pay. It was not until the signing of the final treaty of 1904 that the Government of Chile presumed to say that it did not intend to pay the full amount of this debt, principal and interest. It needs no argument to show that this being a claim subject to diplomatic discussion and having been so for almost thirty years, the doctrine of the exhaustion of legal remedies has no relevancy whatever.

For these reasons it is submitted with confidence that the question of the exhaustion of legal remedies and the denial of justice, even were they, as they are not, before the *amiable compositeur*, must be decided contrary to the contention of the Government of Chile and in favor of the United States.

Chilean Case, Part IV.—The obligations of Chile prior to the Treaty of 1904.

This chapter of the Chilean Case is divided into five subdivisions. The first, Subdivision A, states the understanding of the Government of Chile regarding the contentions of the Government of the United States. The contentions of the United States regarding this point are set forth in the Case of the United States (pp. 44 to 49), and it will be seen from an examination of the points made therein that the Government of Chile has not quite understood the position which the United States has taken in this matter. This inaccuracy of understanding, which will be thus shown, will doubtless account for the seeming assumption that the Government of the United States contends that there is a "universal or peremptory doctrine that a creditor of a conquered State must be indemnified by the conquering State," and that "a refusal on the part of a conquering State to be bound by the obligations of its predecessor does not, by itself, amount to a violation of the rights of private property." (Chilean Case, p. 15.) The Government of the United States has never, and does not now, contend for any such doctrine, as a reading of the Case of the United States will have shown His Majesty.

Chilean Point.—(B) Alsop & Co.'s Interests were not Private.

STATEMENTS OF CHILEAN CASE:

> "Alsop & Co. must show, in the first place, that their interests had attained, at the time of the alleged interference by Chile, the distinct character of private property. Chile submits that it has not been shown and can not be shown that the guarantees given by Bolivia to Alsop & Co. had these requisite characteristics." (Chilean Case, p. 16.)
>
> "It is only necessary to read the foregoing clauses [paragraphs 2, 3, and 4 of the decree of December 24, 1876] to see that these guarantees do not affect with the quality of private property the goods therein considered; both the receipts of the Arica Customs, as well as the 'estacas'—mines granted for common exploitation—were alleged to be the public property of Bolivia, and consequently liable to be seized and confiscated by the warlike occupant.

"Further, neither of these guarantees constituted a mortgage, pledge, or real right of the creditor, but simply financial guarantees of the Bolivian Government founded upon certain specified but contingent sources of revenue, which, so far as the Customs receipts are concerned, did not then exist at all, and so far as the mines are concerned, did not exist in the sense of any such definite source of revenue as can properly be made the subject of *jura in rem.*

"The revenues of a State are unquestionably liable for the payment of its debt and of the public service. Would they be then exempt from appropriation by a victorious State in the event of war? It is, on the contrary, contended that Chile would have had no ground for respecting these guarantees improperly so called, since if they were valid when he who handed them over exercised sovereignty over the territory in which they were situated, they ceased to be so by the mere fact of the debtor having lost this sovereignty.

"The receipts of the Arica Customs were in part the property of Peru and in part, as is shown by the Agreement of the 24th December, 1876, of Bolivia, and Chile, the conqueror and occupier of the territory in which Arica is situate, had a perfect right to appropriate them, as she would have had of taking any other properties of the hostile State, or her sources of income. The exercise of similar rights is recognized as one of the most familiar and legitimate methods of bringing war to a successful conclusion and securing an indemnity against belligerent expense. Similar considerations apply to the 'estacas,' which, though given as a guarantee to Alsop & Co., did not therefore cease to be the alleged property of the Bolivian State and as such liable to confiscation." * * * (Chilean Case, pp. 17–18.)

"The customs receipts, the products of the State mines, were resources upon which Bolivia might rely to make war upon Chile, whose right to deprive her of these resources was, it is conceived, evident.

"Such is the doctrine and practice adopted by nations." (Chilean Case, pp. 18–19.)

The Government of the United States can not refrain from an expression of surprise at this allegation and contention regarding the nature of the rights of the concessionaries, nor from suggesting that, in view of the circumstances that have attended the diplomatic prosecution of this claim against the Government of Chile, this position must be regarded as somewhat tardily taken. The Wheelwright contract was made in December, 1876. From that time until the present, the Government of Bolivia, which made the contract, has not only never suggested that it was not a legal and binding contract, or that it did not confer rights which were

entitled to the protection of Bolivia, but has, on the contrary, repeatedly recognized as binding the obligation which the contract imposed upon that Government, and has never ceased in its negotiations with Chile to insist that this claim, so recognized as valid and subsisting, should be included among those which it regarded as "encumbering the Littoral," and that therefore its payment should be assumed by the Government of Chile upon the passing of the final sovereignty of the Littoral to that country. Moreover, not only has the Government of Bolivia thus in her dealings with Chile considered and treated this contract as being a valid and existing obligation, but so long as Bolivia herself maintained sovereignty over the Littoral her officials were zealous in their defense of Wheelwright in his rights under the contract and in their endeavors to secure to him the benefits thereof.

Further, as has just been stated, the legality of this contract, or that it conferred vested rights in favor of the concessionaries, has never before been challenged by the Government of Chile. It will, on the contrary, be recalled, as was fully discussed in the Case of the United States (Point I, Sub-Points B–C, pp. 86–110), that the validity of this contract was recognized by the Government of Chile in the various protocols and treaties made by the Government of Chile with that of Bolivia, in which provision was expressly made for the satisfaction of this obligation, an obligation which was uniformly characterized as "encumbering the Bolivian Littoral." Moreover, the obligation as to the mines has also been recognized in part by the Government of Chile itself, as is pointed out in the Chilean Case—pointed out, indeed, on the very pages (pp. 24–25) on which it is also contended that the contract conveyed no valid private interests, such recognition being given in a number of executive decrees issued to its officers of local administration concerning the enforcement of this part of the contract after the occupation of the Littoral by the Chilean forces. In addition to this it has been over and over again recognized without question by the Government of Chile in its diplomatic correspondence with the Government of the United States (see Case of the United States, Point III, Sub-Point C, p. 283 et seq.), and, further, not only has the Executive of Chile thus recognized the validity of this contract and the existence of the rights which it confers, but the courts of Chile, while limiting the scope of the rights which the contract conferred, have expressly and definitely found that the contract was a valid and subsisting one and that it conferred

rights—*private rights*—entitled to their protection; and, lastly, the agent of the Government of Chile distinctly recognized the validity and binding effect of the Wheelwright contract before the United States and Chilean Claims Commission of 1901, at which time the specific promise was made to pay the debt arising under this contract. At that time the agent made the following statement:

> "As is stated in the claimant's brief, it is among the liabilities that the Government of Chile engaged to pay for the account of Bolivia. This explains exactly the situation of the claim. The Chilean Government has always regarded it, and does still regard it, as a liability on the part of Bolivia toward the claimant; and in order to induce the Bolivian Government to sign the definite treaty of peace which has been negotiated for many years, the Chilean Government offers to meet this and other claims as part of the payment or consideration which it offers to Bolivia for the signature of the treaty. This has always been the position of the Chilean Government, and it is its position to-day, and if Bolivia signs the treaty the claim of Alsop & Co., as well as the other claims mentioned, will be promptly paid under the treaty engagement as a relief to Bolivia from the liabilities which that Government has incurred and for the account of Bolivia." (App. II, Case of the United States, p. 569.)

It is not, however, necessary, in order to dispose of this contention, to invoke any principle which might be regarded as founded upon or analogous to an estoppel, and the Government of the United States offers the following discussion to demonstrate that this contention of the Government of Chile is not well founded either in law or fact, and that it can not be regarded as in any wise destroying or even diminishing the obligations of the Government of Chile in this case.

Before, however, proceeding to any discussion of the matter it would appear wise again to consider the exact terms of the Wheelwright resolutions. They are in words as follows:

> "LA PAZ, *December 24, 1876.*
>
> "In view of a proposition made by Mr. John Wheelwright, a member and representative of the firm of Alsop & Co., of Valparaiso, in liquidation, for the purpose of providing for the consolidation and payment of its claims against the Government by an assignment of the rights which were acknowledged in favor of Pedro Lopez Gama, a new compromise has been concluded in a cabinet meeting with Mr. Wheelwright which finally terminates this matter. It is drawn up in the following terms:
>
> "First. The sum of 835,000 bolivianos is acknowledged as due the aforesaid representative of the firm of Alsop & Co., together with interest at the rate of 5 per cent per annum, not addable to the principal, and to be reckoned from the date on which this contract is duly executed.

"Second. The said principal and interest shall be amortized by means of drafts, all of which are to be drawn in quarterly installments on the surplus which, from the date on which the present customs contract with Peru terminates, shall arise, from the quota due Bolivia in the collection of duties in the Northern custom house, over and above the 405,000 bolivianos which the Peruvian Government now pays—whether the customs treaty with that Republic is renewed or whether the National Custom House is reestablished.

"Third. All of the silver mines of the government in the department along the coast are hereby devoted to the payment of the said amortization for which purpose 40 per cent of the net profit shall be utilized, except in the mine known as 'Flor del Desierto,' concerning which provision is made in the ensuing article.

"Fourth. The aforesaid mine called 'Flor del Desierto,' together with one other of the government mines to be selected by the party concerned, are hereby devoted to the payment of the interest claimed as due, amounting to 170,700 bolivianos prior to December 18, 1875, and 70,000 bolivianos for the year now expiring. In the mine called 'Flor del Desierto' the quota due the Government and applicable to the payment of this amortization shall be 50 per cent of the net proceeds, and in the other mine it shall be 40 per cent, as in the remaining mines granted. The surplus remaining after the payment of this interest shall be applicable to the amortization of the capital acknowledged as due, as provided in clause 3, it being a condition that if one or both of the concessions produce nothing or little, then this obligation and every claim to said interest due shall be finally canceled.

"Fifth. The operation of the mines of the Government let as concessions in the foregoing articles shall be subject to the contract concluded this date on the subject, the interested party being permitted to assign these rights and this compromise to such persons or companies as he may deem suitable, giving notice thereof to the Government.

"Sixth. In all cases in which sums of money are paid or received, the Chilean peso or the Peruvian sol of stamped silver shall be considered equivalent to the boliviano, either in this contract or in that regarding the mining concessions."

"LA PAZ, *December 23, 1876.*

"In accordance with the compromise made this day it has been agreed by the Government in Cabinet Council with Mr. John Wheelwright, representative of the firm of Alsop and Company, that the operation of the Government mines which have been let out as a concession to said firm on the same date shall be subject to the following clauses and conditions:

"1. Mr. John Wheelwright shall have a period of three years within which to examine the Government silver mines and find the necessary capital with which to put them into operation, it being his duty to take the necessary preliminary measures to this end as soon as possible. The mines shall remain at the disposal of the concessionary during these three years, and the Government shall enable it to gain actual possession thereof by giving the proper instructions to the authorities.

"2. By virtue of the concession which has been made to him the concessionary shall be entitled to organize joint stock companies for the operation of one or more claims, either on the coast or abroad; or else to conclude contracts with the owners of adjacent mines in order to secure the most certain means of operating all or any of the said concessions which in the opinion of the concessionary or companies organized are profitable or will at least pay the cost of working them where veins are already discovered or may be discovered during the three years assigned in the first clause.

"3. The concessionaries may hire and employ in their mining work either foreign or native engineers, employees, or laborers, who shall, during the period for which they are hired, be exempt from all military service as well as every civil or municipal office, except in cases of necessity in order to preserve public order and peace.

"4. The concessionary or companies in charge of the work shall present semiannual balances, on the strength of which, together with the records of the books, the distribution shall be made of the net proceeds, forty per cent being applied by the Government to the paying off of the debt according to the terms agreed upon in the compromise of this date, and sixty per cent going to the petitioner.

"5. The Government shall appoint one or more agents to superintend the work performed, who shall be compensated out of the common funds of the enterprise.

"6. This contract shall last for 25 years, after which time, if there is any residue after paying off the Government's debt in accordance with the compromise, it shall be turned over to the Government.

"7. If, within the first three years or thereafter until the expiration of the 25 years mentioned in the foregoing article, any persons or companies should offer to operate one or more of the mines included in this contract, they may do so provided the present concessionary does not care to undertake the operation thereof and so states in writing to the Government, or else deliberately neglects to make such statement.

"8. The Supreme Government shall grant to the petitioner free of charge, during the continuance of this contract, such lands of the Government as may be necessary for the erection of his buildings and mining establishments."

It will be noted that these decrees deal with and provide for three distinct matters and obligations:

(1) The decrees recognize as due to the concessionaries (Alsop & Co., represented by John Wheelwright) from the Government of Bolivia a principal sum of 835,000 bolivianos (worth at that time about $805,775 American gold, the value of the boliviano being about 96.5 cents). This sum was to bear interest at the rate of 5 per cent per annum from the date of the contract until paid. For the payment of this debt the Government of Bolivia specifically set apart and appropriated all the Arica customs

receipts which might be collected in excess of a definite amount named and provided.

(2) The decrees recognize as due to the concessionaries a sum designated as accrued interest amounting to 240,700 bolivianos (American gold, $232,275.50). For the payment of this sum the Government of Bolivia set aside its proportion of the net proceeds of two mines (one named in the decree and the other to be chosen later) which were to be worked by the liquidator.

(3) The decrees also provide for and include in their terms a twenty-five year lease (running to the aforesaid concessionaries) of the government estacas of public instruction (Estacas de Instruccion Publica) located in the Bolivian Littoral, known as the Coast Department. The contract provided that 40 per cent of the net proceeds coming from the working of the mines (which was the share that, under the contract, was to be allowed to the Government of Bolivia) should also be applied to the liquidation of the principal indebtedness.

What is the nature of the rights thus granted by this contract?

The fundamental error in the Case of the Government of Chile seems to be that which is expressed in the sentence quoted above that "the Customs receipts, the products of the State mines, were resources upon which Bolivia might rely to make war upon Chile, whose right to deprive her of these resources was, it is conceived, evident." (Chilean Case, pp. 18–19.) This is indeed a remarkable doctrine and one that has been so long abandoned that its rehabilitation at the present time justifies its characterization as both novel and strange. It must be admitted that these customs receipts and the products of these mines were "resources upon which Bolivia might rely to make war upon Chile;" but it can be said with equal right and force that all the private property existing in Bolivia belonging to its citizens or to aliens likewise constituted "resources upon which Bolivia might rely to make war upon Chile," for Bolivia might levy upon this property in the form of taxes, in the form of expropriation decrees, or by direct confiscation, or in any other of a number of ways that might be conjured up. But to say that because Bolivia might thus have the right, or, in the absence of a right, then the power, to appropriate property for purposes of war against Chile, that therefore Chile also upon taking possession of all or a portion of Bolivian territory had a legal right to confiscate, without compensation, private property of neutrals located upon the Bolivian territory

she was seizing, and further to say that because Bolivia might have taken it, therefore, *ipso facto*, it belonged to Chile upon her assumption of control over such territory, is to advance a doctrine which has no place in international law.

But even the rights of Bolivia in this matter of appropriation of private property, waiving all considerations of law, order, and the constitution under which that country was governed, could not go to the extent of giving Bolivia unlimited power in this regard, because even if Bolivia in the course of the war should see fit to confiscate and appropriate the private property of neutrals, that Government would be under the necessity of answering for such property at the instance of the Government to which the persons who had been thus treated belonged. How fundamentally sound is this contention is clearly demonstrated by the course pursued by the Government of Chile in connection with the War of the Pacific, for it will be recalled in this connection that, in the pact of truce of 1884, Chile demanded that the Government of Bolivia compensate Chilean citizens for the loss sustained by them as a result of certain actions of the Government of Bolivia in the matter of their property rights, and yet it is apparent that the citizens of Chile were, at the time such appropriation of their property took place, not neutrals, as were the Alsop concessionaries, but enemies of the Government of Bolivia domiciled within her borders and, therefore, theoretically, bearing an entirely different relationship to Bolivia from that borne by Alsop & Co. toward either Chile or Bolivia.

It is therefore clear that this fundamental conception of the Government of Chile not only has no foundation in law, but is absolutely contrary to law and to the fundamental principles of law; and that the mere fact, therefore, that the Government of Bolivia might have seized and used this property of the concessionaires in the course of her war with Chile gave the Government of Chile absolutely no right to confiscate such property any more than it would give that Government the right to confiscate without liability houses and lands or other property belonging to neutrals in the warlike zone. So far, therefore, as the Case of the Government of Chile is based upon this contention it must be regarded as not resting upon a substantial basis.

By this conclusion it is not intended to question, nor is it intended to affirm nor, indeed, to express any opinion whatsoever regarding, the right of Chile to appropriate Bolivia's share

of the Arica customs receipts under the contract of December 26, 1876, nor to question the right of the Government of Chile to receive Bolivia's share of the proceeds of the working of the government estacas in the Littoral under the same contract. Indeed, credit is given for the share accruing to the Government from the operation of the mines under said contract. But what is contended is that the concessionaries under that contract had a clear, valid, subsisting, and vested interest in the Arica customs receipts, as well as in the mines of the Littoral; that these rights were private rights, and that being private rights the Government of Chile can not under the rules and principles of international law, as recognized by all civilized nations, appropriate such private rights without making for such rights so appropriated due and proper compensation.

The Arica Customs.—Dealing with the question of the customs receipts more in detail, it will be observed, as was pointed out in the Case of the United States (p. 264), that articles 1 and 2 of the decree of December 24, 1876, contain the following fundamental provisions:

(1) They recognize a principal debt of 835,000 bolivianos with interest at 5 per cent; and

(2) They provide that this principal and interest shall be "amortized by means of drafts all of which are to be drawn in quarterly installments on the surplus which * * * shall arise from the quota due Bolivia in the collection of duties in the Northern custom house, over and above the 405,000 bolivianos which the Peruvian Government now pays."

That this constituted an actual appropriation of the Arica customs and so vested in Alsop & Co. an absolute right is scarcely open to serious doubt.

In the first place, it is clear that the officials of the Government of Bolivia recognized the contract as having such a legal force and effect. The Minister of Finance and Industry, in his memorial, presented to the National Congress in 1877, stated:

> "Thus the compromise of the 24th of December 1876, was reached whereby there was deducted from the admitted principal the interest which had already been paid and this latter was reduced to 5 per cent, not compoundable, the payment of the principal to be made by drafts upon the excess proceeds of the Customs House of Arica." (See Case of the United States, Point III, Sub-Point A, p. 256.)

The Minister further stated in the same report, after calling attention to the fact that new arrangements were to be made for the collection of the Arica customs, that—

> "True it is, as has been stated in Section 2, that the increase over the actual amount of the proceeds of said custom house is destined to the payment of the debt admitted to be due to Mr. Wheelwright, *but if in this there is an inhibition which prevents the free employment of that fund, the satisfaction of the fulfillment of a duty and the exemption from a burden from which it was necessary to relieve ourselves, remains.*" (Case of the United States, Point III, Sub-Point A, p. 257; App. I, Case of the United States, p. 342.)

Moreover, the Governments of both Bolivia and Chile have repeatedly and uniformly recognized this obligation as an obligation which "*encumbered* the income from the Littoral," which must mean, if it means anything, that the contract had the effect of subjecting the customs receipts to certain rights which destroyed the right of either Government freely and fully to dispose of them. Such was the stipulation in the Matta-Reyes protocol of May 19, 1891, where it was set forth that the payment of the Alsop and other claims would result in "*the products of the custom houses of Arica and Antofagasta in consequence remaining free of all encumbrance* on importations for Bolivia." (American Case, Point III, Sub-Point B, p. 272; App. II, Case of the United States, p. 373.) Again, in the proposed treaty of peace and friendship which, under date of May 18, 1895, Don Luis Barros Borgoña, Minister of Foreign Relations of Chile, and Don Heriberto Gutierrez, representing Bolivia, signed at Santiago, it was provided Chile "binds itself furthermore to pay the following debts *which encumbered the Bolivian Littoral.*" (Case of the United States, Point III, Sub-Point B, p. 274; App. II, Case of the United States, p. 452.) It should be said here that this treaty appears to have been approved by the Chilean Congress. (See Boletin de las leyes i decretos del gobierno, 1896, page 307.)

Moreover, this has been the precise attitude assumed by the Government of Chile in its diplomatic correspondence with the United States, and even as late as 1904 the Minister of Foreign Relations of Chile, in a note addressed to the American Minister at Santiago, stated: "That the Alsop claim is included among the other claims for *credits weighing on the Bolivian coast.*" (Case of the United States, Point III, Sub-Point C, p. 302; App. I, Case of the United States, p. 90.) The terms "encumbered" and "weighing on" are, when used in this connection, terms of art, and it can

not be contended that by using them the two Governments had other or a different meaning than the artistic meaning regularly given.

The attitude of the Government of Bolivia upon this matter accords entirely with what has been set forth above. In a note dated September 10, 1907, the Bolivian Minister of Foreign Relations addressed the American Minister at La Paz in the following language:

> "In reply, I wish to state that on this occasion my Government does not estimate in the same manner as Your Excellency the responsibility of Bolivia relative to the credit of Messrs. Alsop & Co., because, when we are treating of real obligations, the possessor of an object, whoever he may be, continues to be always attached to the obligation. In the present case, Your Excellency may remember that at the payment of the credit acknowledged as due Messrs. Alsop & Co., various mines in the littoral of Bolivia were concerned, thereby constituting a true pledge, which still subsists not only in accordance with the principles of civil law, but also because of the fact that in the Treaty of Peace, the Government of Chile expressly recognized this credit which falls on the said littoral, and which has become part of its territory." (App. I, Case of the United States, p. 40.)

On March 7, 1908, pursuant to a request that the Government of Bolivia make "a formal statement defining clearly and authoritatively Bolivia's attitude in regard to the payment of the Alsop claim," the Minister of Foreign Relations for Bolivia reiterated in precise terms the language above quoted, stating that it clearly set forth the position of the Government as then stated. (See Appendix, p. 18.) Finally, in a note addressed to the American Chargé at La Paz on September 9, 1910, the Minister of Foreign Relations for Bolivia reiterated the position of his Government in the following language:

> "I have read your favor dated 29th of the present month, relative to the Alsop question, and in answer I beg to manifest that the liquidation of this credit belongs absolutely to the Government of Chile, on account of its being a real obligation contracted by it, and by reason of the estaca mines that were bound for its cancelling having passed to its dominion.
>
> "To prove it I only need to refer to the 'notas reversales' of October 21, 1904, exchanged between the E. E. and M. P. from Bolivia, Don Alberto Gutierrez, and the Minister for Foreign Relations of the Republic of Chile, Don Emilio Bello Codecido, which expressly mentioned the definite cancellation (cancelling) of each of the credits comprised in article 5 of the treaty of October 20, 1904, entirely eliminating the responsibility of Bolivia, and the Government of Chile taking charge in all their entirety of all the debts.
>
> "The Government of Bolivia understands that by virtue of this it remains completely separated from the debate." (Appendix, p. 23.)

It will thus be observed that both the Governments of Bolivia and Chile consider that this credit of the concessionaries "encumbered" and as "weighing on" the Arica customs, as well as on the Littoral, and that it was therefore incumbent upon the two Governments to provide for a satisfactory adjustment of such encumbering credits, if they were to have the free disposition of the customs and a clear title to the Littoral.

That a hypothecation or appropriation of customs receipts gives to the one holding such hypothecation or appropriation a vested interest in such customs was also pointed out in the Case of the United States (p. 265), where it was shown that it has become the settled practice of nations to regard mere hypothecations or appropriations (where specific) of the customs of a country as bestowing a vested right in such customs, and to support this statement reference was made to the Silesian loan of 1735, to the so-called diplomatic debt existing in Venezuela prior to the pacific blockade of 1903, as well as to the liquidation of the foreign debt of Liberia by the customs revenue of that Government, which is being appropriated in certain proportions to the payment of Liberia's English loan, the customs service being administered by representatives of the Government of Great Britain. Attention was also called to the more recent liquidation of this foreign debt by the Government of the Dominician Republic through a formal treaty drawn and negotiated for that purpose, by which arrangement that Government bound itself to appropriate a certain proportion of its customs receipts to the liquidation of debts due from it to the nationals of other powers; and, finally, it was noted that in the pact of truce of 1884 negotiated between the Governments of Chile and Bolivia the Government of Chile stipulated for and secured the greater part of the Bolivian customs receipts collected by the port of Arica for the satisfaction of claims of Chilean subjects against Bolivia, an arrangement which appears to have been perpetuated by various protocols and treaties for more than twenty years. (Case of the United States, p. 236.)

To these instances there might have been added a further one set forth in volume 52 of the British and Foreign State Papers, pp. 237, 238, in which Lord John Russell, British Foreign Secretary, in an instruction to Sir C. L. Wyke, British Minister in Mexico, laid down the doctrine involved in these words:

> "You are aware that it has not been the custom of Her Majesty's Government, although they have always held themselves free to do so, to interfere authoritatively on behalf of

> those who have chosen to lend their money to foreign governments, and the Mexican bondholders have not been an exception to this rule. The constitutional government, however, while established at Vera Cruz under the presidency of Señor Juarez, concluded with Captain Dunlop, two years ago, an arrangement by which it was stipulated that 25 per cent of the customs receipts at Vera Cruz and Tampico should be assigned to the British bondholders, and 16 per cent to the holders of convention bonds. That convention was confirmed and extended by the arrangement lately made by Captain Aldham. The claims of the bondholders, therefore, to the extent provided for in these arrangements, have acquired the character of an international obligation, and you should accordingly insist upon the punctual fulfillment of the obligations thus contracted." (Moore's Int. Law Dig., Vol. VI, p. 719.)

Finally, as was also pointed out in the Case of the United States (p. 265), writers of international law are clear and explicit in their statements of the principle which makes of such a transaction as the one under discussion a contract creating and vesting private rights.

Concerning such a situation of affairs, Hall, in his "Treatise on International Law" (5th ed., p. 420), lays down the following rule:

> "He (a belligerent in military occupation of foreign territory) levies the taxes and customs, and, after meeting the expenses of administration in territory of which he is in hostile occupation, takes such sum as may remain for his own use."

But, adds Mr. Hall in a note:

> "*From the taxes, customs, or other state revenues which an enemy may take for his own use must be excepted any which have been hypothecated by the state in payment of any loan contracted with foreign lenders before the commencement of the war.*"

Therefore, even granting that the Wheelwright contract was merely an hypothecation of the customs revenue instead of being, as it is, an actual appropriation of such revenues, the Government of Chile would not be and could not be considered as exercising a legitimate belligerent right in expropriating the funds which had been thus appropriated for the payment of the Wheelwright debt; and when it is considered that here there had been not an "hypothecation" only, even in a general sense, but an actual appropriation of the customs receipts, which was so recognized by the Government of Bolivia, the operation of the principle laid down by Mr. Hall becomes too clear for further argument.

The same general principle as to belligerent rights is also expressly recognized by Westlake in his work on International Law (Part I,

p. 62), in which, speaking of the payment of obligations resting upon a transferred province, the author says:

> "The bondholders have no legal claim on the acquiring state beyond the part of the debt, if any, so assumed, *unless their contract gave them a specific security on the revenues of the ceded province, or on state property in that province which passes by the cession.*" (See Case of the United States, p. 265.)

But the proposition that the rights conferred by the Wheelwright contract in the Arica customs were private vested rights and that any party appropriating these customs became guilty thereby of a tortious act must be considered to have been placed beyond all controversy by the arbitral decisions of international commissions, which have pronounced and given judgments in accordance with that principle. Such has been the law laid down in at least two cases where the matter has come up for determination. The first case was that of *Moses* v. *Mexico*, which came up for determination by the United States and Mexican Mixed Claims Commission of 1868. It appears from the opinion in that case that one—

> "Joseph Moses made several contracts to supply the Mexican army with arms, munitions, and military clothing. He delivered the goods promised by him, and we ought to suppose that he faithfully fulfilled all his engagements, since the constitutional government, sitting at that time at Veracruz, acknowledged and bound itself to pay in favor of Moses the sum of $77,655.91 as the result of the liquidation of accounts. In this $30,000 were included arising out of several contracts made between claimant and General Vidaurri, and which had been acknowledged by the paymaster of the Army of the North. It appears from a communication of William Prieto, visitor of custom-houses, dated the 19th of March, 1859, that the Mexican Government had formerly ordered the payment in full of the amount due Moses by the custom-houses of Matamoros and Mier, but afterwards countermanded the payment of the aforesaid $30,000, arising out of Vidaurri's contracts, not because there was any objection to the justice of the credit, but because the requirements of the Army of the North rendered necessary the appropriation of a larger part of the proceeds of the custom-houses of Matamoros and Mier."
>
> * * * * *
>
> "So much for the facts: Let us consider the law as to the question whether this claim is included among those submitted to this commission under the convention to which it owes its origin.
>
> "The question has been discussed with ability and learning in behalf of the claimant and the Mexican Government as to the jurisdiction of this commission to adjust claims arising out of contracts or other transactions in which, without violence or any

exercise of authority, foreigners have delivered their property to the Government of the country and trusting in the honor and good faith of that Government have voluntarily become its creditors. I do not believe that the circumstances of the present case involve the determination of this question, and I think that for the present it may be left intact, by considering the case from its proper point of view. Although Moses had made several contracts with the Mexican Government, the present claim does not arise out of those contracts. Although he was originally a voluntary creditor of the Mexican Government, he has not come at present to demand the fulfillment of those engagements. Neither is the position of the Mexican Government that of a party called upon to fulfill a contract or to pay *quod interest*, in default of fulfillment, nor is the claim limited to the mere fact of the *omission* of the payment of what had been promised without the creditors having taken all the necessary steps and made the applications required to constitute his debtor *in mora* and impose upon him a new responsibility different from that arising out of the contract.

"Let us bear in mind some of the circumstances of that case. Moses presented for payment the account of what was due to him under his *contracts*. It was then that he claimed that the Mexican Government should fulfill *its obligations arising out of the contract*. The Mexican Government acknowledged those obligations and in pursuance of this acknowledgment it promised Moses to pay him through the custom-houses of Mier and Matamoros. The creditor accepted the promise, more or less willingly, on account of the difficulties which might have resulted in case of his refusal, and from that time the circumstance of the obliged party, being an *authority or public power*, commenced to be an element of importance in the case. But yet, inasmuch as the law says '*voluntas quamvis coacta voluntas est*,' so it could properly be said that the condition of the payment made by the custom-houses of Matamoros and Mier was the result of a voluntary compact. But let us see the subsequent action of the Mexican Government. It orders that from the $77,000 to be paid to Moses a deduction should be made of the $30,000 due to him under the Vidaurri contracts. To issue such an order it neither obtained nor asked for the consent of Moses. On the contrary claimant applies to that Government and requests that a decree so prejudicial to his interests shall not be carried into effect and that the former promise of payment in full may be fulfilled. He is then answered that the Government acknowledges his right, but declines to comply with his request on account of the scarcity of funds. Here is lacking the element of the will and consent of Moses, which previously had characterized the obligations incurred in his favor. Here is now an order affecting his interests issued by the Government and to which he was not a party. Here is, in short, the occupation of his property against his will. Should we give a technical name taken from the law to such an act, that name could only be that of '*vis sine armis illata*,' and that this act is comprehended in the generic name of *injuries* I think is beyond question. The cause, more or less reasonable, more or less

excusable, inducing the action of the Mexican Government, may be of great importance for the purpose of giving a judgment as to the morality, the necessity, and the intention of the author of the act, but can not change its character of a refusal made to a creditor, against his will, of what was due to him. Of course, if the payment to Moses could not be made without depriving the soldiers of their daily pay, if the Government had to choose between denying the troops their bread and refusing to pay Moses, there can be no sensible man who will blame the Government nor consider its action as criminal or of bad faith. But it is true that desiring to fulfill the preferred obligation the Government refused to comply with the other which admitted of postponement and was less urgent. The Government adopted such a course as *minimi de malis*, and could not ignore nor ought it to-day to be surprised at the consequences."

* * * * *

"My opinion is that an award of the sum of $32,600 in the national Mexican currency ought to be made in favor of this claimant, with interest at the rate of 6 per cent per annum from the 9th of March, 1859, till the end of the labors of this commission, and $100 for costs, all of which the Government of the Mexican Republic shall pay to the Government of the United States.

"My respected colleague concurs in the decision and award without entering into the reasoning of this opinion." (Manuscript Opinions of the United States and Mexican Claims Commission, 1868, Vol. I, p. 335.)

The decision in this case is in strict harmony with the contention of the United States (Case of the United States, p. 232 et seq.) that one who seizes and appropriates customs receipts appropriated for the payment of a debt commits thereby a tortious act for which he must respond in damages, and that a plea of military necessity does not operate to relieve such liability.

The same point arose in a second case, which is reported by Mr. Ralston in his work "International Arbitral Law and Procedure" (p. 250) as follows:

"In an unreported case before the Italian-Venezuelan Commission, sitting in Caracas in 1903, it appeared that national obligations had been given against the pledge to pay the same by lot out of the surplus which might exist annually in certain government funds. It appears that, although such surplus had existed during several years, no such selection by lot had taken place, but the surplus had been used for other purposes. The Umpire held that the debt could be considered as having matured, because of this default on the part of the Government, and gave award accordingly."

In view of these repeated recognitions, by both Bolivia and Chile, that the Wheelwright contract did create rights in the

Arica customs; in view of the general practice of nations to recognize and enforce such rights (as is shown by the fact that in the various cases of so-called pledging or hypothecating, already cited, the Governments concerned have rigidly enforced the real transaction, which consisted in the appropriation of a certain percentage of the customs receipts either to the service of the loan or the discharge of the debt, precisely as in the Wheelwright contract); in view of the direct and unequivocal principle of international law as declared by two great modern international writers; and, finally, in view of the determination made upon this point by arbitration tribunals themselves, it is not perceived in what way doubt can lie regarding the nature of the rights created by the Wheelwright contract in the Arica customs. It is submitted that under these recognitions, precedents, and principles it must be regarded as clearly established that the Wheelwright contract gave to the concessionaries a private vested right in the Arica customs which the principles of international law required that the Government of Chile should recognize and protect, and that the failure to observe and protect these rights has rendered Chile liable for the money improperly appropriated by reason of this failure.

It will of course be understood that in making these contentions regarding the Arica customs receipts the Government of the United States has only in mind, as belonging to the claimants in this case, the excess over and above 405,000 bolivianos, and that with reference to this latter sum, i. e., 405,000 bolivianos, the Government of the United States does not undertake to express any opinion whatsoever regarding the ownership or disposition of such part, nor the propriety or impropriety of the appropriation thereof by the Government of Chile. The Government of the United States contends merely that the concessionaries had a vested legal right, title, and interest in the Arica customs receipts over and above the 405,000 bolivianos annually, and that any state, Bolivia or any other, which should collect the Bolivian customs at that port had absolutely no right, title, or interest in any customs so collected except the 405,000 bolivianos, and that all sums in excess of such amount, no matter by whom collected, should, until the debt was paid, have gone to the concessionaries under the Wheelwright contract of 1876. In other words, that any collector of Bolivian customs at Arica merely stepped into Bolivia's place, and that such person must be regarded as having no greater rights than the rights of Bolivia, and as being subject to the same obligations as rested upon the Government of Bolivia.

The Government Estacas.—Referring to the mining rights possessed by the concessionaries under their contract, it should be stated, as was pointed out in the Case of the United States (Point II, Sub-Point B, p. 161), that an examination of the provisions of these decrees will show that they provide for and grant the following mining rights, titles, and interests:

First. The contract gave to Wheelwright, representing the concessionaries, the exclusive right to possess and operate such of the "Estacas de Intruccion Publica" located in the Littoral, or Coast Department, of Bolivia, as he (Wheelwright) should within a period of three years from the date of the contract select (Art. I, Decree of Dec. 23, 1876), provided that in case he failed to work any of the estacas he had designated such estacas might be operated by other persons, if Wheelwright stated in writing to the Government that he did not care to undertake the operation of such estacas, or if he deliberately neglected to make such statement. (Art. 7, Decree of Dec. 23, 1876.)

Second. The contract conveyed to Wheelwright for the concessionaries an absolute right to hold, possess, and operate these mines, under the provisions of the contract, for a period of twenty-five years from the date of the contract. (Art. 6, Decree of December 23rd.)

Third. The contract stipulated and provided that the net proceeds to be derived from the operation of these mines were to be divided in the following proportion: 40 per cent was to go to the Government of Bolivia and 60 per cent to the lessees. (Art. 4, Decree of December 23; Art. 3, Decree of Dec. 24.)

Fourth. The contract further stipulated and provided that said 40 per cent of the net proceeds belonging to the Government should be and was thereby appropriated, set aside, and applied to the payment of the 835,000 bolivianos, with interest at 5 per cent, recognized as due by the contract. (Art. 4, Decree of December 23d, and Art. 3, Decree of December 24th.)

Fifth. The contract stipulated and provided that the lessee was to pay to the Government of Bolivia at the expiration of the leasehold interest (that is, at the expiration of twenty-five years from the date of the contract) such remaining sum or sums of the said 40 per cent belonging to the Government of Bolivia as were left after paying off, in accordance with the plan agreed upon, the debt of 835,000 bolivianos with interest recognized by the contract as due from the Government of Bolivia to the concessionaries. (Art. 6, Decree of December 23rd.)

Sixth. The contract contained a special provision stipulating for the liquidation of the accrued interest recognized under the contract, by providing that this interest was to be met, if met at all, by the sums realized from the operation (though under another and different plan for the distribution of the net proceeds) of two mines, one of which was named in the contract. (Arts. 3 and 4 of Decree of December 24th.)

Seventh. The concessionaires were to hold the mines for a full period of twenty-five years (Art. 6, Decree of December 23rd) and it was immaterial to the life of the lease whether or not the debt was paid. Indeed the contract contemplated, as is shown by express words (Art 6, Decree of December 23rd), that the debt would be paid before the expiration of the twenty-five years, and provided for the distribution of the proceeds in such an event.

In this connection it should be recalled, as was pointed out in the Case of the United States, Point II, Sub-Point A, p. 115 et seq., that under the civil law the original title to all mining property, or minerals, rested in the King and it was stipulated in the Pragmatica of Don Alonzo XI (1383) that "no one shall presume to work them (mines of silver, and gold, and lead, or any other metal whatever) without our special license and command." This is the essential characteristic of the civil law governing and controlling the location and operation of mines to-day, at least in Spanish-American countries, since the operator of the mine never acquires an absolute title to a mine by his location and working thereof, but he secures only a right to work the mine so long as he observes certain conditions, and when and so soon as he fails to observe such conditions the mine becomes susceptible of denouncement by any other individual—that is, the original title of the State may be considered to revest, thus subjecting such mines to the operation of the general laws regarding denouncement. The essential point, therefore, which is to be kept clearly in mind in connection with this whole discussion of the nature of the mining rights created by the Wheelwright contract, is that under the Spanish-American mining law no one ever acquires an absolute title to a mine, but on the contrary he only acquires a right under certain conditions to operate the mine and appropriate the proceeds thereof so long as his operations are carried on under certain prescribed conditions. In other words, there always exists in the Government a kind of reversionary right to all the mineral lands in the State, which right is self-operative and becomes effective so

soon as the operator of a mine fails to observe the conditions under which he is permitted to work the property.

It appears, however, that in the early Spanish law, and in the law of Bolivia, the sovereign power (the King in the one case and the State in the other) enacted laws which provided that in addition to this reversionary right possessed by the sovereign in all mining lands of the State there should be reserved a special and particular right in certain mining properties, such mining properties being set aside to a particular use, and to be subject to and operated under special conditions (prescribed by the sovereign, the King or the State, respectively) other and different from those which governed the exploitation of mining lands in general. These latter lands, it will be observed, would appear to bear the same ultimate relation to the sovereign that was borne by all the mineral lands in the State—that is, all were owned by the State and all reverted finally to the State when the terms and conditions were, as to the general mines, violated, and as to particular mines, fulfilled, the only difference being the manner in which the right to operate such mines could be secured and the disposition which should be made of the proceeds of such operation. Indeed, the relationship which existed between the sovereign and these two sorts of mining property seems to be much the same as exists to-day between the Government of the United States and the two sorts of ordinary public land belonging to the public domain. As is known, the public land of the United States is surveyed in rectangular townships, each township being divided into thirty-six sections. In general, all of these lands may be acquired by citizens of the United States, a title in fee simple being granted thereto, but a law of the United States stipulates that the sixteenth and the thirty-sixth sections in each township shall be devoted to school purposes, and the conditions for acquiring title to such lands is made other and different in certain respects from those of acquiring title to the balance of the public domain. The title, however, acquired by the settler is in the end the same, the difference being in the procedure by which title is secured and in the purpose to which the proceeds resulting from the disposition of the lands are applied.

So with the acquisition of mines in Bolivia. Under the general laws of that Government it was provided that any person might enter upon the public domain and there locate in the proper manner mining properties or claims, it being also and further provided by the law of Bolivia (directly following the principles

of the early Spanish law) that after the prospector had located for himself two or three claims (the number depending upon the locality in which the entry was made), the claim next following after such locations by the prospector should be regarded as set apart by the Government of Bolivia for a special purpose, and for the operation of these claims a special arrangement with the Government was necessary. In other words, the simple difference between the two sorts of claims was this, that while the prospector's claims were operated under general laws and regulations, the reserved claims were operated under special and particular regulations which were embodied in a special contract negotiated between the Government and the operator. It should also be observed that, since the operator of these reserved estacas was under the duty (by virtue of his contract) of turning over to the Government of Bolivia for its use a portion of the net proceeds of the operations of such mines, the Government of Bolivia granted to him certain privileges not possessed by those who were operating mines that were part of the general public domain, among which privileges was that of holding these reserved claims free from the liability of denouncement, an incident of the possession and operation under the general mining laws of the Republic, as also the privilege of operating such estacas through adjacent mines, etc.

It is in evidence, as set forth in the Case of the United States (Point I, Sub-Point A, p. 55 et seq.), that the Bolivian Congress, and even their Constituent Assemblies, repeatedly authorized the Bolivian Executive to make contracts for the leasing of these reserved estacas, and that at least on one occasion prior to the Wheelwright contract (the lease to Gama of April 1, 1873; Case of the United States, p. 163) it did lease the mines under a contract that was precisely the same in its fundamental features as the contract with Wheelwright of the 26th December, 1876. (See *infra*, p. 129.)

In view of this analysis of the nature of the right granted to operators of mines in general, as well as of the rights obtained with reference to the reserved estacas such as were the subject of the contract between John Wheelwright and the Bolivian Government, it is submitted that it must be conceded that the rights granted and enjoyed in each of the two classes of mining lands under discussion were in essence the same, and that if the rights possessed by the operator in either case were private rights, then the rights possessed by the operator in the other case must be private rights, and, therefore, since there is no question but that the

rights granted to the ordinary estacas were private, there can be no question but that the rights granted to operate the reserved estacas were likewise private. Nor is this conclusion in any wise affected by the fact that in one case, that of the general public domain, the operator of the mines took all of the proceeds therefrom, and that in the other case, the case of the reserved estacas, the operator of the mines turned over to the Government a certain proportion of the net proceeds of such operation, since this was the one difference between the two, namely, that the Government should have, with reference to the proceeds, a certain right in one case which it did not have in the other, while the real title possessed by the operators of the respective mining claims is absolutely the same, that title being merely the right to operate the mine so long as the operator observed the conditions attaching to his operations, no matter whether such conditions were embodied in a general law or in a special contract, in each case the mines returning to the State upon the happening of the prescribed events.

That the conclusions reached above are sound with reference to the rights granted by the Wheelwright contract is sufficiently demonstrated by the following considerations:

In the first place, the various laws and decrees of the Government of Bolivia authorized the Bolivian Executive to sell, lease, or rent, or provide for the working in partnership of the estacas of instruction. Such was the decree of 1852, the law of October 19, 1871, the decree of November 2, 1871, and the decree of September 19, 1872. (See Case of the United States, Point II, Sub-Point B, p. 178.) Moreover, such was the status given to this contract under the various decrees issued by the Bolivian Government for the putting of the same into force. (See Case of the United States, Point I, Sub-Point C, C^1, p. 72.)

Furthermore, the Government of Chile recognizes in its Case (p. 22) that the concessionaries under the Wheelwright contract and the Government of Bolivia had entered into a certain partnership arrangement regarding these mines. While the Government of Chile invokes this fact to substantiate its unsupportable contention that the rights of Wheelwright were therefore properly confiscable by the military occupant of Bolivian territory, it is of interest to note that such a contention loses sight of the fact that the State might well grant to neutrals an interest in state property which a military occupant must respect. Upon this point see the comments of Hall and Westlake already given above.

Again, the courts of Chile in the cases of the *Amonita* and the *Justicia* (see Case of the United States, p. 209 et seq.) have recognized that these contracts gave to Wheelwright certain vested rights, titles, and interest which they protected and enforced, and while the courts erroneously construed the extent of the rights to which Wheelwright under his contract was entitled, they nevertheless recognized the contract, as just stated, as vesting in the concessionaries a definite right which should be respected and protected.

Finally, as the Government of Chile points out in its Case (pp. 24–25), the Government of Chile has repeatedly recognized the existence of this contract by executive decrees issued for the purpose of ascertaining the extent of the operations of Wheelwright under his concessions. (See also Case of the United States, Point I, Sub-Point C, C[5], p. 96.)

In the face of all this the Government of the United States can but repeat its surprise that the allegation and contention that the mining rights granted under this contract are not private rights, nor refrain from suggesting that, in view of the circumstances that have attended the diplomatic prosecution of this claim against the Government of Chile, this position of that Government, which is now for the first time advanced, must be regarded as somewhat tardily taken.

PRECEDENTS CITED IN CHILEAN CASE UPON QUESTION OF ALSOP RIGHTS.

The Government of Chile having laid down the doctrine above discussed, that the rights of the concessionaries under the Wheelwright contract were not private rights, and therefore were not entitled to be respected, the Case of that Government then announces that the "diplomatic history of Chile furnishes other precedents not altogether irrelevant to these considerations," and then proceeds to set forth, without having given any adequate account of the origin and nature of the suits from the decisions in which they quote, certain statements made in the course of their opinions by the various tribunals before whom such suits were brought.

An examination of these cases indicates, however, that they arose out of transactions essentially similar one to the other, but unlike the transactions upon which the present claim is based.

The first case cited in the Case of the Government of Chile is that of *Twycross* v. *Dreyfus*, 1877, L. R., 5 Chancery Division, p. 617. From a statement in that case it appears that in June, 1870, the defendants, Dreyfus Brothers et al., issued, as the agents in London of the Peruvian Republic, a prospectus of a loan which the Republic of Peru was desirous of making. This case is reported as follows:

> "This prospectus announced the issue by the government, at the price of 82½ per cent., of the sum of £11,920,000 6 per cent. consolidated bonds for the construction of railways, and it contained the following statements:—
>
> "The securities specially hypothecated for the due payment of the interest and principal of these bonds are as follows:—
>
> "'1. The national credit of the republic, solemnly pledged by the Government of *Peru* in the name of the republic, with the general hypothecation of all its real property and revenue.
>
> "'2. The customs dues of the Republic of *Peru*, amounting annually to soles 4,000,000, or £800,000.
>
> "'3. Certain railways therein specially mentioned.
>
> "'4. The surplus proceeds of the guano to be imported into the United Kingdom of *Great Britain and Ireland*, her colonies, to the Continent of *Europe*, and to the *United States of America*, after providing for the service of the existing 5 per cent. government loan of 1865 (of which £7,199,200 is still in circulation), and of the guaranteed *Pisco Sca Railway* loan of £290,000. The sale of guano amounts to 55,000 tons per annum, producing a net revenue of about £440,000.'
>
> "On the faith of the statements in the prospectus the Plaintiff applied for and purchased several of these bonds, and paid for them the sum of £3,256 12*s.* 6*d.* Each of these bonds was executed on behalf of the Republic of *Peru*, and was signed by Don *Toribio Sanz*, the financial agent of the government.
>
> "On each of these was printed a statement of the conditions on which the bonds were granted, of which the following were referred to in the argument as material:—
>
> "'6. As a guarantee for the fulfilment of the obligations contained in this bond, the Government of *Peru*, under the national faith, pledges the general revenue of the republic, and especially the free proceeds of the guano in *Europe* and *America*, after the engagements which it has contracted on them are covered, the proceeds of the railways from *Areququa* to *Puno*, &c., and the free revenue of the working thereof and the receipts of the custom houses of the nation.'
>
> "'8. In all the contracts which the Government may enter into for the sale of guano, or under whatever form this sale may be, it binds itself that there be set aside out of the funds of each half year a sum sufficient for the service of that same half year and after such service being secured, to dispose freely of the surplus.'
>
> "Interest was duly paid by the republic on the bonds till the 1st of July, 1875, but since that date no interest had been paid, nor any part of the principal of any of the bonds.

"The 9th paragraph of the statement was as follows:—

"'Since the issue of the bonds, the republic has from time to time forwarded to each of the Defendants large quantities of guano for the purposes of, thereby or thereout, or out of the proceeds of sale thereof, paying the unpaid interest on and the amortization of the said bonds. This guano was part of the guano mentioned in the said prospectus and bonds as forming part of the security to the said bondholders for the payment of their principal and interest; and this guano, or the proceeds of the sale thereof in the hands of the Defendants, respectively became applicable and ought to have been applied by the Defendants in the first place in or towards payment of the unpaid interest on the said bonds.'

"It was further stated as follows:—

"The Defendants had sold part of the guano so forwarded to them, but still retained large portions in their possession in *England;* but they refused to apply any part of the guano still in their possession or the proceeds of such part as had been sold towards payment of the unpaid interest on the bonds.

"The Defendants claimed a charge or lien on the guano and its proceeds, and threatened to appropriate such guano and proceeds to their own use; the Plaintiff was unable to ascertain how they had acquired such charge or lien; but he alleged that such charge or lien (if any) was subject to the rights of the Plaintiff and other holders of the bonds.

"The Plaintiff was willing and offered to make the Republic of *Peru* a party to the action, if the republic should so desire, and had given notice thereof to the republic. The said republic, however, made no claim to the said guano, moneys, funds or securities, or any part thereof, or to any interest therein.

"The Plaintiff claimed to have declared that he and all other the holders of the bonds had a first charge on the said guano, moneys, funds, and securities then in the hands of the Defendants in priority to any claim by the Defendants, and to have the bonds enforced, as the Court might think just.

"The Defendants, *Dreyfus Brothers* and *J. H. Schröder & Co.*, demurred to this statement of claim on the ground that the matters in question were none of them within the jurisdiction of the Court; that the Plaintiff, and those upon whose behalf he sued, had no such charge on the guano, moneys, and securities mentioned in the statement of claim (if any such there were) as could be enforced, or have effect given thereto by this Court; or, at all events, no such charge as could be enforced or have effect given thereto in the absence of the Republic of *Peru*, which was a necessary party to the action, and a sovereign power over which the Court had no jurisdiction.

"They also put in a statement of defence in which, among other things, they denied that they had received any guano for the purpose of paying the interest of the bonds thereout or out of the proceeds of the sale thereof.

"The demurrer was set down for argument before Vice-Chancellor *Hall*, and came on for hearing on the 6th of March, 1877."

Hall, Vice-Chancellor, allowed the demurrer, from which decision the plaintiff appealed. The appeal was heard on the 18th of April by Jessel, Master of the Rolls, who delivered the following opinion:

"The first and most important point we have to decide is what the meaning of the bond of a foreign government given to secure the payment of a loan is. As I understand the law, the municipal law of this country does not enable the tribunals of this country to exercise any jurisdiction over foreign governments as such. Nor, so far as I am aware, is there any international tribunal which exercises any such jurisdiction. The result, therefore, is that these so-called bonds amount to nothing more than engagements of honor, binding, so far as engagements of honor can bind, the government which issues them, but are not contracts enforceable before the ordinary tribunals of any foreign government, or even by the ordinary tribunals of the country which issued them, without the consent of the government of that country. That being so, it appears to me that the bond in question confers no right of action on the Plaintiff, and on that ground it seems to me it follows that the demurrer ought to be allowed.

"But I wish to say a word or two as to the special circumstances of the case. First of all a prospectus is set out which contains certain statements of what is about to be hypothecated, but the prospectus stated also that bonds would be issued. Bonds were issued and accepted by the subscribers to the prospectus, and those bonds stated in a definite way, under seal of the financial agent of the Republic of *Peru*, the terms on which the loan was issued. It appears to me that after that there was an end of the prospectus. *A fortiori*, that observation applies with respect to all bonds purchased in the market by persons who had nothing whatever to do with the prospectus. I think they are all in the same position as to that. Now, what does the bond offer to them? In my opinion, rightly construed, and having reference to the nature of the government which issued it, it did not amount to what, as regards a private individual, could be treated as a mortgage. It says, 'As a guarantee for the fulfilment of the obligations contracted in this bond, the Government of *Peru*, under the national faith' (that means the national honor, the national faith in the sense of good faith), 'pledges the general revenue of the republic, and especially the free proceeds of the guano in *Europe* and in *America*, after the engagements which it has contracted on them are covered,' and other property. What is the meaning of the word 'engagement?' First of all, everybody knows that the first engagement a government contracts to pay out of its own revenues is the engagement necessary to continue its own existence as a government to pay for its military and civil services to any extent the government thinks necessary. How can any rational person call that a mortgage or pledge which is preceded by the right of the pledger to appropriate as much of the property as he pleases to any purpose he thinks desirable for his own use? It is impossible to look upon that seriously as a pledge. It is so much as the government chooses to leave them after

satisfying the ordinary engagements and wants of the government. Then there is another stipulation that in all the contracts which the government may enter into for the sale of guano, or under whatever form this sale may have, it binds itself to direct that there be set aside out of the proceeds of each half year a sum sufficient for the service of that same half year, and after such service being secured, to dispose freely of the surplus. That is, the government binds itself to direct it. If it does not direct it you have nothing but the national faith to look to or to appeal to.

"The case beyond that is simply this: It is said the government has sent guano to some agents in *Europe*, who are made Defendants; that these Defendants have sold the guano, that they have notice of the bonds, that they claim some charge or lien on the guano—it is not said what it is, because the Plaintiff does not know and can not ascertain—and that the republic makes no claim. All that is perfectly consistent with this, which for aught I know maybe the case, that the Peruvian Government have borrowed money to more than the amount of the proceeds of the guano from these agents, and that the agents are entitled to retain the proceeds in repayment of that loan, and that loan may be a loan contracted by the government for the purpose of satisfying its most pressing wants and needs—wants which must be satisfied in order to secure the existence of the government as such. All that is perfectly reconcilable with these statements. But even if it were otherwise, I think the same result would follow. You can not sue the agent in the absence of the principal. The principal is the Peruvian Government. You can not sue the Peruvian Government at all, and therefore, you can not sue its agents. There is no question of trusteeship, it is simply a case of agency. I am of opinion that the decision of the Vice-Chancellor was correct, and that it must be affirmed. The appeal will be dismissed with costs."

With this opinion Lords Justices James and Mellish agreed.

It will be observed, in connection with this case, cited by the Government of Chile, *first*, that the claim was dismissed on demurrer for want of jurisdiction because the suit has been brought against the defendants as agents for the Government of Peru; that "You can not sue the agent in the absence of the principal. The principal is the Peruvian Government. You can not sue the Peruvian Government at all, and therefore you can not sue its agents;" *second*, whatever was said by the court, therefore, regarding the nature of the rights of the plaintiffs against the Government of Peru is quite clearly *obiter dicta*, and could therefore have no determinating force or effect so far as the present case is concerned; and, *third*, that even if such *obiter dicta* did have any force, it announces no principle that would defeat recovery in this case, but, on the contrary, contains such an analysis of the contract under which the plaintiffs sought to recover as clearly to differentiate and dis-

tinguish it from the present contract in the matter of elements and principles, such analysis leading inevitably to the conclusion that had the present contract been before the learned Master of the Rolls his *obiter dicta* would have led to a directly opposite conclusion regarding this case and have caused him to deliver a decision for the plaintiffs upon the merits.

Before dealing in detail with these *obiter dicta*, in which the court discussed the character of national pledges, it is desirable to refer to the first paragraph of the decision. The learned Master of the Rolls in this first paragraph of his opinion appears to consider that, since the English courts have no jurisdiction over foreign governments, and since there is no international tribunal exercising any such jurisdiction, therefore the bonds under discussion amounted to "nothing more than engagements of honor," and therefore conferred "no right of action on the plaintiff."

It is, of course, true, as the Master of the Rolls stated, that inasmuch as the English courts had no jurisdiction over foreign governments, therefore the contracts were not "enforceable before the ordinary tribunals of any foreign government, or even by the ordinary tribunals of the country which issued them, without the consent of the Government of that country;" but this latter conclusion, though sound, does not justify in logic or law the conclusion theretofore stated, namely, that therefore the plaintiff had "no right of action," and there can be no doubt but that Sir George Jessel so understood; because, while it might well be true, as stated, that there was no permanent forum before whom a plaintiff in such a case could, as a matter of course, bring a claim of this sort against a foreign government, yet the whole history of arbitration, as the learned Master was well aware, is made up of occasions and precedents in which governments have created a special tribunal for the specific purpose of affording a forum before which claimants of this character might present their claims for adjudication. It would be, indeed, a strange commentary upon international tribunals and upon the judgments which they have pronounced (a commentary, indeed, which the erudite Master would be incapable of making) to say that such tribunals had during all this time been operating upon documents and regarding transactions which conferred no rights upon the parties possessing such documents and carrying out such transactions. It is submitted, therefore, that in international law a clear distinction must be drawn between the existence of a right and the existence of a forum before which such right may be tried and adjudged.

In the present case, the fundamental thing which appeared, in the estimation of the learned Master of the Rolls, to be wanting in the Dreyfus case—that is, a proper forum clothed with jurisdiction—has been supplied, for the protocol of submission of December 1, 1909, created the tribunal before whom the Government of the United States should present its case. The reasoning of the learned Master of the Rolls is therefore inapplicable to this case. These comments have appeared necessary in order that there should be no misunderstanding or misapprehension of the preliminary remarks of the court in the Dreyfus case.

It will be noted that those parts of the Dreyfus contract which impressed the mind of Sir George Jessel were that the bond "pledges the general revenue of the republic, and especially the free proceeds of the guano in Europe and in America, after the engagements which it has contracted on them are covered, and other property. * * * How can any rational person call that a mortgage or pledge which is preceded by the right of the pledger to appropriate as much of the property as he pleases to any purpose he thinks desirable for his own use? It is impossible to look upon that seriously as a pledge."

The distinctive feature of the Wheelwright contract as contrasted with the Dreyfus contract is that it contains a specific provision regarding the amount which the Government may have, and provides that the concessionaries shall have all over and above the amount so specifically provided for the Government. It was not, as was the case before Jessel, M. R., a case in which the concessionaries were entitled to "so much as the Government chooses to leave them after satisfying the ordinary engagements and wants of the Government."

Again, the contract under which Twycross brought his suit merely provided, as the Master of the Rolls pointed out, that the Government "binds itself to direct that there be set aside out of the proceeds of each half year a sum sufficient for the service of that same half year, and after such service being secured to dispose freely of the surplus." As was stated by the court, "the government binds itself to direct it [that is, the setting aside of the surplus of the loan]. If it does not direct it you have nothing but the national faith to look to or to appeal to."

In the case of the Wheelwright contract all sums beyond the 405,000 bolivianos which might be received each year were definitely appropriated to the payment of this loan by the contract itself, the only act left to be done in order to enable the conces-

sionaries to realize upon their right—and the performance of this did not rest with the Bolivian Government or in its discretion, but with the concessionaries (the Bolivian Government having placed the matter entirely beyond its control)—was merely the drawing of trimonthly drafts upon the Arica custom-house, which drafts would automatically call for the payment of the sums for which they were drawn.

Moreover, as was pointed out in the Case of the United States, page 237, it is perfectly obvious from even a casual reading of article 2 of the decree of December 24, 1876, that the customs receipts specified in that article are not pledged, mortgaged, or hypothecated in any technical sense; they are not in any proper sense a mere *security* for the payment of the debt recognized as due by the Wheelwright contract; but they are, on the contrary, the very fund appropriated for and from and by which the debt is to be paid. This decree of December 24, 1876, purports and does definitely and specifically appropriate to the payment of this debt all beyond a certain definitely and precisely fixed sum which may be collected in certain of the Bolivian custom-houses; it is an actual appropriation of money, and not merely a pledging or hypothecating of customs receipts as security, by and through a contract which was negotiated and concluded by the Executive of the Government of Bolivia and ratified by the Bolivian Congress. This constitutes the strongest and clearest kind of an analogy to an ordinary appropriation bill recommended by an executive to the legislature, the bill being later passed by the legislature, thus constituting an appropriation of the funds so voted; and inasmuch as the Wheelwright contract thus constitutes the Arica customs receipts (over and above 405,000 bolivianos annually) a specific fund appropriated for the payment of this debt, it is of interest to observe that it is good law, that the one to whom an appropriation is made by a legislative body has in such fund so appropriated a clear legal title sufficient indeed to enable him to compel, by mandamus, the payment to him of such fund by the public officers having such fund so appropriated in their charge. In this connection the attention of His Majesty is most respectfully invited to the cases of *The King* v. *The Lords Commissioners of the Treasury*, 1835, 4 Ad. & E., p. 236; *The King* v. *The Lords Commissioners of the Treasury, in re Hand*, 1836, id., p. 984; *Roberts, Treasurer*, v. *United States*, 176 U. S., 221; *Roberts* v. *Consaul*, 1905, 24 Appeal Cases, District of Columbia, p. 551; and *Kendall* v. *United States*, 12 Peters, 524.

It is therefore clear that as to all sums over and above 405,000 bolivianos collected as customs duties upon Bolivian goods at the port of Arica the concessionaries, under the contract of 1876, had an absolute right, and, as contended in the Case of the United States, the appropriation of such rights by anyone whatsoever rendered such appropriator liable for the amounts appropriated.

It is thus submitted that, contrary to the opinion of the Government of Chile, the Twycross case is "altogether irrelevant" to the issues involved in the present case.

The second case cited in this connection by the Government of Chile, that of *Domis & Co.* v. *Dreyfus Brothers & Co.*, before the Paris Court of Appeals, is founded upon the same contract, and the result reached by that court in its judgment delivered July 25, 1877, being substantially similar to that delivered by the English courts, and based upon the same considerations and the same contract, needs no further comment.

The same statement may be made, it would appear, regarding the decision of the Court of Appeals of Brussels, so far as may be gathered from the statement made in the Case of the Government of Chile. The actual decision of that court has not, however, been examined by this Government.

Regarding the other precedent to which reference is made in the Case of the Government of Chile, the following statement regarding the circumstances out of which it arose is taken from the statement made by the Hon. John Bassett Moore in his work on International Arbitrations, vol. 5, p. 4863.

It appears that during the War of the Pacific, Chile directed, by a supreme decree dated February 9, 1882, the sale of 1,000,000 tons of guano located in Peruvian provinces of which she was the military occupant. By article 13 of the decree it was provided that the proceeds of the sale of this guano should be divided equally between the Government of Chile and such Peruvian creditors as were secured by pledges of guano; and under article 16 of the decree it was stipulated that the Chilean Government would deposit in the Bank of England the half destined for the payment of Peruvian creditors, such deposit to pass title to such creditors as should establish their right thereto before a board of arbitrators, for the satisfaction of which provision was made.

Article 4 of the treaty of peace negotiated between Chile and Peru on October 20, 1883 (known as the Treaty of Ancon), confirmed the Chilean "supreme decree" of February 9, 1882, and it was also provided that "after the sale of the million tons had

been effected the Government of Chile would continue to pay over to the Peruvian creditors 50 per cent of the net proceeds of guano till the extinction of the debt or an exhaustion of the deposits then being worked." Article 6 provided that the creditors who might be entitled to share in the proceeds of this deposit must submit themselves to the procedures provided in the supreme decree—that is, to an arbitration.

The arbitration stipulated in the decree not having been carried out, and certain complicated transactions and resulting rights becoming involved in the matters in controversy, the whole question was referred, for determination, to the Swiss Government, and pursuant to negotiations which were thereafter carried on a tribunal was formed to which all claims of creditors of Peru on the fund in the Bank of England were submitted for determination. This tribunal is known as the *Tribunal Arbitral Franco-Chilean*, and sat at Lausanne, Switzerland, where it held its final session on July 5, 1901.

Among the parties presenting themselves before that tribunal with claims was the Peruvian Corporation, Limited, which, according to its own statement, presented itself in the following capacity:

> "The Peruvian Corporation (Limited) appears before the arbitral tribunal in the name and in its capacity as assignees of the holders of bonds of the Peruvian foreign loans contracted in 1869, 1870, and 1872. (Mem. 2, p. 1.) It is holding (Mem. 1, pp. 147–148) (a) all the securities (except two bonds amounting together to £120) of the loan of 1869, originally amounting to £290,000, subsequently reduced to £264,680. The certificates were acquired on May 18, 1885, from the Committee of Pisco-Ica by the bondholders of 1870 and 1872 (Corp. Doc. No. 117, p. 276 et seq.); (b) £1,927,400 of bonds of the 1870 loan and £21,441,700 of the bonds of the 1872 loan, i. e., an aggregate of £32,369,100, and in addition the value of the nondetached coupons. (Corp. Doc. No. 116, p. 270 et seq.)
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> "The securities representing the following sums, £214,190 and £105,048, say in aggregate £319,220, were not presented for conversion; the shares corresponding to these bonds, not yet converted, of the two loans were set apart and kept at the disposal of the holders in the event they should have them converted.
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> "The plaintiff prays the court for an award granting it the whole amount deposited in the Bank of England for distribution among the holders of bonds of the 1869, 1870, and 1872 loans, in accordance with the contracts entered into by them." (See Tribunal Arbitral Franco-Chilean, Sentence, p. 75.)

Inasmuch as the bonds of 1870, represented by the Peruvian Corporation, Limited, arose out of the transactions and agreements

before the courts for adjudication in the Twycross case and likewise before the courts at Paris and at Brussels, and as these transactions and agreements have been already discussed, it is unnecessary to say anything further regarding this interest which the Peruvian Corporation represented.

However, as the transactions out of which and in connection with which the other bonds represented by the Peruvian Corporation, Limited, have not been before considered, a brief statement will be made regarding such agreements, particular attention being paid to the character of the so-called pledge which was given to secure the bonds in question.

The bonds specified under (a) above were secured, according to the allegations of the Peruvian Corporation, Limited, before the tribunal, by the following clauses appearing on the bonds issued for the loan:

> "And the Supreme Government of the Republic hereby engages and binds itself under that head, transfers, and mortgages as a special guaranty of redemption as above stated of the capital of £290,000 (1,450,000 sucres, Peruvian money) of that loan and for the payment of the semiannual interest, as above stated, an annuity or annual sum of £20,300 (101,500 Peruvian sucres), said guaranty to endure twenty-five years at the annual rate of 7 per cent. *The Government pledges and gives further as guaranty of the same sum the surplus of the guano deposits of Peru*, said surplus being understood to be *what shall remain after the discharge of the obligations assumed in the interest of the national debt*, in accordance with existing contracts." (See Tribunal Arbitral Franco-Chilean, Sentence, p. 58.)

The loan of 1872 was secured under the following general obligation, as set forth by the Peruvian Corporation, Limited, in its pleadings before the tribunal:

> "VI. In guaranty of the execution of the engagements assumed by the present obligation, the Government of Peru on the faith of the nation engages *all the existing quantities of guano belonging to the Republic*, particularly those of the Island of Guanape, Macabi, Ballestas, Lobos, Baie de l'Indépendance, Pabellon de Pica, and the other guano deposits existing on the coasts and in the waters of Peru, also those that may be discovered hereafter, and generally all the guano deposits and particularly the net proceeds of exports of guano to Europe and America, with the only reservation of the engagements now in force relative to the Government's loans of 1865, 1866, and 1870, and the guaranteed loan of the Pisco-Ica Railway Company for £290,000. In addition, the Supreme Government of Peru, with the reservation of the contracts existing and in force, relative to the aforesaid loan of 1870 (and so far as the said contracts affect it), pledges the property of the Arequipa, Puna, Mejia,

Callao, La Oroya railways, as well as that of all other roads to be built out of the proceeds of the present loan, and in addition the net proceeds from the operation of the said railroads, and specially the receipts of the customs of the national and the irrigation works that may be affected, and lastly all the revenues of the Republic generally." (Tribunal Arbitral Franco-Chilean, Sentence, p. 61.)

With these various contract engagements with their so-called pledges before it, the tribunal rendered a decision which reads in full as follows:

"Whereas the plaintiff, while recognizing that it has no mortgage constituted according to the rules of the Peruvian civil law, contends that it holds on the guano a real right identical with mortgage and sanctioned by international law; a real right which would result from the State of Peru applying guano to the guaranty of a public loan;

"But as the existence of such a right is confirmed neither by the doctrine nor by the practice of international law; as the Peruvian Corporation itself has not attempted to justify it by alleging any authority or any precedent; as it rests on an inaccurate judicial appreciation of the relations existing between the borrowing state and the private persons, subscribers to the loan; as indeed these relations exclusively appertain to private law and can in no case come under the rules of international law which govern judicial relations of the states among themselves considered as active and passive subjects of rights (Rivier Principles of International Law, vol. 1, o. 45; Holtzendorff, Völjerrecht, p. 1), and not the contractual relations formed between a state and a private person;

"Whereas it is true that states occasionally intervene in differences arising between a state and its creditors to protect the interests of their nationals and notably to demand the execution of engagements under which the debtor state pledged itself to apply certain property or certain revenues to the payment of certain debts, but this intervention, although exercised by virtue of international law, never has any object other than the accomplishment of an obligation, the nature and scope of which are determined by the rules of civil law under which it originated;

"Whereas the plaintiff which, according to its own confession, holds no mortgage in the sense of civil law, can not, therefore, claim any analogous guaranty based on a principle of international law." (Tribunal Arbitral Franco-Chilean, Sentence, p. 253.)

It will be observed that none of the so-called pledges given in any of these contracts can be regarded as equivalent to the legal situation created by or arising out of the Wheelwright contract of 1876, which specifically appropriates to the payment of the obligation recognized by the contract as due a certain part of the proceeds of a particular custom-house—that is to say, all of the proceeds received at the Arica custom-house over and beyond a

specified sum (405,000 bolivianos annually) which was retained by the Government of Bolivia to assist in meeting the current expenses of the Government.

It was fully set forth in the Case of the United States, Point III, Sub-Point A, page 257 et seq., that the customs collected at Arica and properly belonging to the Government of Bolivia at the time this contract was made far exceeded the annual 405,000 bolivianos; that this fact was known to the Government officials of Bolivia; that they had it specifically and distinctly in mind when they negotiated and concluded the Wheelwright contract; and that they intended that this excess, which was definite in everything except the mere amount, should go to the concessionaries. That their belief upon this point was well founded is conclusively demonstrated by the fact that the Government of Chile, after taking over the collections of the customs of 1880 at Arica, derived from such customs a sum (over and above the share later retained by Chile to meet the expenses of collection, and to cover the appropriate portion corresponding to the consumption of goods in Arica) more than sufficient to satisfy completely the Wheelwright obligation within two years or by the middle of 1882.

This definite appropriation to a specified object of a fixed and determined amount clearly differentiates and distinguishes the Wheelwright contract from the contracts relied upon by the Peruvian Corporation and passed upon and adjudicated by the Lausanne Tribunal. Moreover, the tribunal had clearly in mind the principle herein contended for, since in that part of the decision, as above set forth, which the Government of Chile omitted from its quotation, the tribunal specifically stated that—

> "It is true that states occasionally intervene in differences arising between a state and its creditors to protect the interests of their nationals and notably to demand the execution of engagements under which the debtor state pledged itself to apply certain property or certain revenues to the payment of certain debts, but this intervention, although exercised by virtue of international law, never has any object other than the accomplishment of an obligation, the nature and scope of which are determined by the rules of civil law under which it orginated."

The conditions set forth in this extract are precisely and fully met by the provisions of the Wheelwright contract, and therefore this decision which the Government of Chile invokes to support its contentions not only fails so to do because of the differences which exist between the contract under discussion and the Wheelwright contract, but on the contrary the decision

of the tribunal distinctly recognizes that under instruments such as the Wheelwright contract creditors have a title which the granting and the succeeding government must respect, and that to secure the enforcement of such instruments the creditor may invoke the assistance of his own government.

Before closing this phase of the discussion of the present case, the Government of the United States desires to call attention with reference to the question as to the nature of the rights granted to Alsop & Co., under the Wheelwright contract of 1876, to certain admissions made by the Government of Chile which in the judgment of the Government of the United States makes complete and perfect the analysis already given before. In the first place the Government of Chile has made the following statement as recorded on page 6 of the Case of the Government of Chile:

STATEMENT OF CHILEAN CASE.

> "It will be sufficient at this stage to say that a capital debt was therein agreed, and that rights were given to Alsop & Co., in respect of certain Customs duties of Arica and certain mines in the district of Caracoles, for the purpose of enabling them to recover principal and interest." (Chilean Case, p. 6.)

There is here, as will be observed, a clear and definite statement that the Wheelwright contract did give to Alsop & Co. certain rights, and with this admission of the Government of Chile in mind it is also of interest to observe the conclusion which the Government of Chile draws with reference to the rights of Alsop & Co., if such rights are private in their nature. On this point the Government of Chile says:

STATEMENT OF CHILEAN CASE.

> "If the premises from which the Government of the United States deduces these conclusions were correct, the Government of Chile would find little difficulty in discovering common ground, since it has never ignored the elementary rule that private property must be respected by belligerents. On the contrary, the weakest nations have most interest in the constant observance of the principle that war is only waged between one State and another." (Chilean Case, p. 15.)

In face of the analysis above made, which it is submitted conclusively demonstrates that the rights granted under the Wheelwright contract of 1876 were private rights, and in face of the admission to the same effect by the Government of Chile as that admission has just been set forth, the Government of the United States

submits that the two Governments are here actually upon common ground, and that this being so the rule as to private property which is recognized by the Government of Chile in the quotation last above made must be regarded as applying in this case, and therefore the Government of Chile must be considered as having recognized the principles of law and the liabilities resulting therefrom for which the Government of the United States is herein contending.

MISCELLANEOUS CHILEAN STATEMENTS UNDER THIS POINT.

STATEMENTS OF CHILEAN CASE.

> "It may be claimed that, in the Treaty of Peace with Bolivia of 1904, there is an arrangement binding the Government of Chile to respect the guarantees of the claim of Alsop & Co. The reference is apparently to the last clause of Article 2, which established that: 'The High Contracting Parties will recognize the private rights of natives or strangers which have been legally acquired in territories which, in virtue of this Treaty, are under the dominion of either country.' Such a disposition relates exclusively to the civil rights which have the capacity of being 'acquired' according to the legislature of the ceding country." (Chilean Case, p. 21.)

It is not entirely clear what is meant by the phrase "civil rights" as used in this statement. If the phrase is to be interpreted in accordance with the meaning which is usually attached thereto under the common law—that is, if the rights contemplated by the phrase are the rights of personal security, personal liberty, and the right to hold and enjoy property—such rights as were enumerated in the great English Bill of Rights of 1689, or as were broadly described in the American Declaration of Independence as the right of "life, liberty, and the pursuit of happiness"—then, indeed, this is a novel interpretation of such a treaty provision, an interpretation, indeed, which could scarcely be supported by logic or precedent. If, on the other hand, the phrase is intended to have reference to property rights "which have the capacity of being 'acquired' according to the legislature of the ceding country"—that is, ordinary property rights—then it is only necessary to say that (as was fully demonstrated in Point I of the Case of the United States) the rights acquired under the Wheelwright contract of 1876 come clearly within the rights contemplated by the treaty. Upon this point it is not without interest to observe

that the courts of Chile have recently given to that provision the interpretation last suggested, which, indeed, accords with the plain purport of the language and the usual meaning given to such a provision.

In a suit brought by Don Carlos Aramayo against the State in the matter of the measurement of the nitrate properties in the Toco, the court of first instance, in delivering its opinion, made the following statements regarding this treaty provision:

> "5th. And whereas: The petition, therefore, refers to nitrate properties granted in 1873 by the Authorities of Bolivia and in accordance with Bolivian jurisprudence in the territory which passed under the sovereignty of Chile in the Treaty of Peace and Friendship of the 20th of October of 1904, the Bolivian law must be applied to the case in conformity with Article IX of the Civil Code, the law of the 7th of October of 1861, and Article II of said Treaty, according to which 'there will be recognized by the High Contracting Parties the private rights of their citizens and of foreigners which might have been acquired legally in the territories which, in virtue of this Treaty,' or, in other words, as to Chile, in the territories situated between the River Loa on the North and parallel 24° on the South, in conformity with the Complementary Protocol of said Treaty dated November 15th, 1904. (Appendix, p. 147.)

STATEMENT OF CHILEAN CASE.

> "The species of anticresis constituted by the delivery of the 'estacas' in order that the creditor may pay himself out of the produce does not constitute a real right under the Bolivian Civil Code or under that of Chile, the only systems of law to which the Contracts entered into herein between the Government of Bolivia and its creditor the firm of Alsop & Co. could be subject. In fact, the former of these Codes authorizes under another name a system of anticresis under which the creditor pays himself the produce of the personal or real property conveyed for this purpose; but the creditor has no right of property nor of preference, in payment of his claim, over the thing given in anticresis, as is shown by Articles 1416 and following of the Bolivian Code in force at the date of the Contract. Articles 1429 and following of the Code which now governs the civil relations of citizens of that country may also be cited in this connection.
>
> "The Chilean Code is not less explicit. Applying to anticresis the same effects as the Bolivian Code, it expressly provides (Article 2438) that anticresis does not give the creditor for himself alone any real right over the thing conveyed. In this way it solved the difficulty raised by a few jurists who thought they saw in such a contract some of the elements that constitute a real right." (Chilean Case, p. 18.)

The question of the exact nature of the Wheelwright contract, with particular reference to its relation to a contract of anticresis, has, it is believed, been already sufficiently discussed in the Case of the United States, Point II, Sub-Point B, page 161 et seq. It will be recalled that, as was shown in that analysis, the Wheelwright contract, so far as it concerned the estacas of public instruction located in the Littoral, provided that these estacas should be leased to the concessionaries for a period of twenty-five years; that they should be operated (except as to two mines specified, the proceeds of which were to be applied to the payment of accrued interest) under a plan which provided that 60 per cent of the net proceeds of the operation of the mines should go to the concessionaries and that the other 40 per cent should go to the Bolivian Government, with the further provision that this 40 per cent should be applied by the concessionaries to the payment of the debt of 835,000 bolivianos and interest, so long as any part of said debt or interest remained unpaid—it being also stipulated that such amounts of said 40 per cent as remained from the operation of the mines after the paying of said debt with interest should be turned over to the Bolivian Government.

As was pointed out in the Case of the United States (p. 178 et seq.) this was one of the kinds of contract which the National Executive was authorized to make with reference to these mines. Such were the stipulations of the decree of 1852 (the first positive law providing for the creation of these estacas), as well as the stipulations of the law of October 19, 1871, which authorized the Executive "to celebrate contracts of renting or working in partnership all the mines (Estaca-Minas)," as likewise the stipulations of the decree of November 2, 1871, based upon the law of October 19, and the decree of September 19, 1872, under which laws and decrees the Wheelwright contract of 1876 was negotiated and concluded.

Moreover, this is precisely the kind of a contract (as was pointed out in the Case of the United States, p. 163 et seq.) which was negotiated and concluded between the Bolivian Government and Pedro Lopez Gama under date of April 1, 1873. It will be recalled in connection with the Gama contract that the resolution of December 21, 1872, recognizing in Gama the right to the value of 150,000 registered tons of guano, provided in its third article that "the total amount of one million eighty-seven thousand five hundred pesos, which is the value of one hundred and fifty thousand tons at the

average price of seven pesos two reals, as agreed upon, shall be paid to Mr. Pedro Lopez Gama out of the net proceeds of the Government from the operation of the mines which are to be let out as concessions on April 1st, 1873." (App. I, Case of the United States, p. 305.) Pursuant to the plan announced in this resolution, the Government of Bolivia called for bids for the operation of the Government estacas and as a result received three proposals, one from Messrs. George Earl Church, Emile Erlanger, and Julius Beer; another from Pedro Lopez Gama; and a third from Mr. Narciso Noriega, attorney for Mr. Carlos von der Heyde. (App. I, Case of the United States, p. 314.) The Bolivian Government accepted the Gama proposal and awarded to him the contract for the exploitation of these mines. It is entirely clear that in this Gama contract it was merely a coincidence that the man who secured the contract for the operation of the mines was also the man to whom the Government of Bolivia owed a debt, and, further, that so far as the debt and the contract for the operation of the mines are concerned they were entirely separate and distinct. This is made clear by the Minister of Finance of Bolivia in his report to the Congress of 1874, in which, after setting forth the facts relative to the recognition of an indebtedness to Gama and the negotiation with him of the mining contract of April 1, 1873, the Minister remarks that "by coincidence of personal circumstances the partnership contract perfected the compromise, which was incomplete because the Government had not specifically determined the manner in which it would fulfill its obligations to satisfy the claim recognized." (Appendix, p. 166.)

It will be observed, therefore, that the Gama transaction taken as a whole provided for the leasing of the mines, the payment to the Government of a certain percentage of the net proceeds, and of an appropriation of a part of the Government's share to the payment of the Gama debt. This was precisely the nature and character of the Wheelwright contract. It likewise provided for the leasing of the mines, for the payment to the Government of a percentage of the net proceeds, and for the application of the Government's share to the payment of the debt recognized as due to Wheelwright. It is believed to be unnecessary further to discuss this matter in order to establish that the legal effect of these two contracts was precisely the same and that neither constituted in any sense at all a pledging or hypothecating of the mines for the payment of the debt. Nor does such a contract as that set forth constitute a contract of anticresis. It is deemed

unnecessary to repeat here the technical analysis of the requirements of a contract of anticresis which was given in the Case of the United States (Point II, Sub-Point B, p. 172 et seq.), and reference is made thereto, should it be desired again to consider that matter. It might be said, however, that the analysis therein made conclusively demonstrates, as the Government of the United States submits, that this contract fails utterly to meet the requirements and to embody the essential elements of the contract of anticresis.

Chilean Point.—(C) The Debt was not Local.

STATEMENTS OF CHILEAN CASE.

> "A further reason for saying that the present claim does not fulfil the conditions of a right of private property is found in the fact that the succession of Chile to Bolivia was not a complete succession, but only a succession to a small portion of Bolivian territory. This is an important consideration, of a general character affecting the validity of the claim from a very early period.
>
> "It is, no doubt, fairly arguable that when a State has entered into contracts and engagements, otherwise valid, with private individuals in respect of services rendered by them entirely for the welfare of the territory of that State, and when such a State is afterwards annexed to another it is equitable that the annexing State should respect those contracts and engagements.
>
> "So if the moneys which it is said were lent by Lopez Gama to Bolivia had been employed to the exclusive benefit of the territory in which were situate the mines set apart to the successors of his claim, and if there had been no other special circumstances to alter the situation, Chile might perhaps—though by no means certain—have been under the obligation of paying such debts.
>
> "But in the case of Alsop & Co. this circumstance did not operate, but on the contrary it is very well known that the littoral was the most deserted part held by Bolivia, and that far from being a source of burdensome expense to Bolivia it was only a source of income destined to the use of the rest of the country.
>
> "The justice of these views has been conceded both by practice and by the works of theoretical writers." (Chilean Case, pp. 22 to 23.)

Inasmuch as the argument under this heading appears to be based entirely upon the incorrect assumption that the Government of the United States is contending that there is a "universal or peremptory doctrine that the creditor of a conquered state must be indemnified by the conquering state," and inasmuch as

this is not the contention of the United States, it is perhaps sufficient answer to all that is said above to show that this point is not at issue between the two Governments and that the contentions of the Government of Chile, as above set forth, would seem to have no relevancy or pertinency to the contentions which the Government of the United States is in fact making in this case.

To show how clearly this is the situation and how inapplicable the supposed contention of the United States would be to the situation in this case, it is only necessary to show that the Government of Chile did not conquer Bolivia, but in fact took only a small proportion, in square miles, of the territory of Bolivia, and that therefore the doctrine with the promulgation of which the Government of Chile appears to charge the United States, even if such doctrine were well founded in international law, could have no application to the present case. But as the question of the *locality* of this debt has been raised by the Government of Chile the Government of the United States is pleased to submit the following discussion upon this point.

Before calling attention to the attitude heretofore taken by the Governments of Bolivia and Chile upon this question of the *locality* of this debt, it may be well to observe that in speaking of the locality of a debt there are at least two kinds of locality which must be considered: First, the locality of expenditure of the sums represented by the debt; and, Second, the locality of payment, or the locality which is charged with the discharge of the obligation.

This is the principle announced by Hall. Speaking of the local right and obligations which, upon the division of a state, are transferred to the new state, he says:

> "Local debts, whether they be debts contracted for local objects, or debts secured upon local revenues, are binding upon it." (International Law, 5th ed., p. 92.)

The entire argument of the Government of Chile is based on the assumption that there is but one sort of locality, namely, the locality of expenditure, and that since it considers that this case does not meet the requirements of that particular kind of locality, therefore the Government of Chile can not be regarded as responsible therefor.

It is believed, however, that as a matter of fact and law the debt in the present case answers in a large measure the requirements of the first kind of locality and completely meets the demands of the second.

As to the first of these *localities*, the locality of expenditure, it may be observed that, as is apparent from the résumé already given of the operations of Gama in the Littoral, all the transactions between Gama and the Government of Bolivia (out of which the Gama debt arose) had to do exclusively with operations in the territory which was afterwards taken over by the Government of Chile, which territory the two Governments have heretofore contended was charged with the payment of this obligation, such operations and transactions all having to do with the exploitation of guano from the Littoral. Moreover, it was because the Governments of Chile and Bolivia interfered with the formal rights granted by Bolivia to Gama in the Littoral that the losses incurred by Gama arose, and that the rights conferred upon Gama in compensation for such losses were given. Further, it appears that the money spent by Gama (which money had been advanced by Alsop & Co.) was in large part used by Gama in explorations conducted in the Bolivian Littoral, in order to determine the location and extent of the guano deposits to be found in that region and also in facilities for loading and shipping the guano. In view of these facts it is submitted that the debt may properly be regarded as having been incurred by reason of expenditures made by Gama in the very territory which both parties afterwards regarded as charged with the payment of the debt. In other words, there was in this case a locality of expenditure—that is, money was actually expended in and for the benefit of the territory to which the parties afterwards looked for its liquidation and discharge. This being true, there is here, at least in part, a "debt contracted for a local object" (as defined by Hall) and therefore a debt which should be met by the State taking over the territory.

But whatever may be the situation with reference to the locality of expenditure as thus explained, it is entirely clear that the situation here meets the requirements of the other locality mentioned—that is, the locality of payment—and that the parties interested—that is, both Bolivia and Chile—have always recognized this to be the true situation.

In the Matta-Reyes protocol of May 19, 1891, it was provided in the second article that—

> "The Government of Chile will take charge of and assume the payment of the obligations recognized by that of Bolivia in favor of * * * as well as the credits which *encumbered the income from the Littoral* by reason thereof and which are * * * the credit acknowledged in favor of Lopez Gama, representing the House of Alsop & Co., of Valparaiso * * *;

> *the products of the custom-houses of Arica and Antofagasta, in consequence, remaining free of all encumbrance on importations for Bolivia.*" (Case of the United States, p. 272.)

It is unnecessary to point out that at this time the debt was considered by both parties as a liability that was an encumbrance upon the Littoral and the custom-house receipts, which would remain free from encumbrance only upon the payment of the debt.

In the treaty of peace and friendship negotiated between the two Governments under date of May 18, 1895, it was provided in article 2 as follows:

> "The Government of Chile assumes the obligations recognized by the Government of Bolivia in favor of * * * . It binds itself furthermore to pay the following debts *which encumbered the Bolivian littoral*, namely: * * * the credit of Don Pedro Lopez Gama, now represented by the firm of Alsop & Co., of Valparaiso. * * *" (Case of the United States, pp. 273–274.)

It will be recalled that it appears this treaty was approved by the Chilean Congress and proclaimed, and therefore it must be regarded as expressing the will and the views of the entire treaty-making power of the Republic of Chile. (See Boletin de las leyes i decretos del gobierno, 1896, page 307.)

The attitude which was thus jointly taken by the two Governments at the time of the negotiation and signature of those treaties remains the attitude of the Government of Bolivia to the present time. In a note dated September 21, 1906, from the Bolivian Minister of Foreign Relations to the American Minister at La Paz, the former set forth the position of his Government upon this question in the following language:

> "In reply I beg to advise Your Excellency that my Government has always considered that the responsibilities derived from obligations affecting the coast territory have followed the fortune of that territory and should be assumed by the holder thereof, the products of which have been enjoyed exclusively thereby, and that the generic responsibility founded on the general principles of law has assumed a positive character by the consummation of the Treaty of October 20, 1904, celebrated precisely with the object of settling all questions arising out of the cession of territory there contemplated and among them in a specific manner the credit of Messrs. Alsop & Co. By virtue of which, the same efforts which Your Excellency mentions in the Despatch under reply are proofs of the perfect and absolute understanding of the stipulation referred to, efforts which will surely result satisfactorily in view of the justice and equanimity of the Governments of Chile and the United States." (App. I, Case of the United States, p. 35.)

Finally, the matter is placed beyond all doubt by the expression of the Government of Chile itself through its Minister of Foreign Relations in a note dated July 2, 1904, in which, referring to a communication of the American Minister at Santiago, the Chilean Minister of Foreign Relations said:

> "In this respect, it corresponds to me to reiterate to Your Excellency that the Alsop claim is included among the other claims for *credits weighing on the Bolivian Coast*, the payment of which will be assumed by Chile on the terms to be established in the respective treaty at the close of the negotiations at present going on towards that object between the Governments of Chile and Bolivia. Only then will it be possible for the undersigned to give to the said Alsop claim the attention it deserves." (App. I, Case of the United States, p. 90.)

Chilean Point.— *(D) Chile's Interference was not Wrongful or Injurious.*

STATEMENTS OF CHILEAN CASE.

> "But in the case of Alsop & Co. there are still other circumstances which would suffice to place beyond doubt the fact that Chile is in no way responsible to them. For the Claimants must show that the interests interfered with were damnified in respect of purely private rights lawfully acquired and in a manner exceeding the rightful prerogative of a sovereign State to govern and control territory subjected to it by conquest. It is submitted that no such proof can be given by Alsop & Co., but that, on the contrary, Chile behaved with liberality in her dealings with the interests of Alsop & Co. after the success of her military operations." (Chilean Case, p. 24.)

It has already been conclusively demonstrated that the rights possessed by the concessionaries under the contract of December 26, 1876, were private rights under any legitimate definition of that term and it is therefore submitted that the contention of Chile as expressed in this paragraph is without merit.

STATEMENTS OF CHILEAN CASE.

> "Bolivia, to begin with, during the war with Chile, confiscated the property of the Chileans and took possession of the mines and funds of the great mining companies of Huanchaca, Corocoro, Oruro, and others belonging to Chileans, thereby entitling Chile in reprisal to do the same with the properties of private persons in Bolivia; but she did not do so." (Chilean Case, p. 24.)

It is further submitted by the Government of the United States that even if the fact alleged by Chile in this paragraph be true, namely, that Bolivia confiscated the property of Chileans and took

possession of mines belonging to Chilean enterprises, that can not be invoked as a reason why the Government of Chile should confiscate and take possession of neutral American interests located in the Bolivian Littoral. The doctrine of reprisal can have no such force as will justify, under the conditions of this case, the confiscation of property belonging to nonbelligerent and neutral aliens.

STATEMENTS OF CHILEAN CASE.

> "Again, the mines given for common working to Alsop & Co. were situated in Chilean territory south of the twenty-third degree; Chile, on this account also, might have legitimately recovered them from those who were in possession of them without a valid title. But she did not do so. It is, indeed, essential to notice that Alsop & Co. continued in possession of the mines as long as they liked without any molestation from the Government of Chile. On the contrary, they enjoyed in so doing the protection of the Chilean authorities. This is evident from the documents which the company exhibited in their case before the Washington commissioner above referred to." (Chilean Case, p. 24.)

As to these statements, it will be noted in the first place that the territory in which the mines were situated was not Chilean territory and never had been up to the time of the granting of the concessionary contract of 1876. This was clearly demonstrated in the discussion to be found in the Case of the United States under the heading of Revindication, page 130 et seq.

In the next place, this being true, the statements in the Chilean Case that the Government of Chile might have "legitimately recovered them [the mines] from those who were in possession of them without a valid title" must be regarded as without foundation in fact or in law. The further statement that "Alsop & Co. continued in possession of the mines as long as they liked with no molestation from the Government of Chile" is likewise not in accord with the facts of this case. It is true that it does not appear that the executive officers of the Government of Chile actually evicted Wheelwright or those working for him from any of the mines which he held, but it is equally true, and this has been conclusively shown in the Case of the United States, that the courts of the Government of Chile, which, as well as the Executive, are a part of the Government and for the action of which, as much as for the action of the Executive, the Government of Chile is responsible, persistently refused to place Wheelwright in possession of the mining estacas to which he was entitled under the

contract of 1876. This point has been fully covered by the discussion in the Case of the United States. (Point II, Sub-Points E and F, pp. 198–231.) In view of these facts it is unnecessary to comment upon the further statement made in the Chilean Case that "on the contrary, they enjoyed in so doing [that is, in continuing in possession of the mines] the protection of the Chilean authorities."

STATEMENTS OF CHILEAN CASE.

> "Next, as to the receipts of the Arica Customs. The circumstances relating thereto equally demonstrate the aims which animated Chile after her victories in the war provoked by Peru and Bolivia. As it has been said, these receipts being the property of the enemy, Chile was entitled to appropriate them in accordance with well understood principles of the Law of Nations. Bolivia may have offered to apply to the redemption of the Alsop claim a part of what might ultimately fall to her of these receipts, in accordance with certain arrangements that she had with Peru. But when the right to these receipts was lost to Peru, what could Alsop & Co. expect by this arrangement, and what receipts is it reasonable to suppose that they would have collected in time of war, seeing that they never collected them in time of peace?" (Chilean Case, p. 26.)

As has already been pointed out above in discussing the nature of the rights held by the concessionaries under this contract, Chile was not entitled to appropriate these rights and there are no well-understood principles of international law giving to her any such rights. On the contrary, as was fully discussed in the Case of the United States, as cited above, it is entirely clear that customs receipts pledged to the payment of a debt contracted by the retiring sovereign are not subject to appropriation by the overrunning sovereign. (Case of the United States, pp. 265–270.) The balance of the paragraph relating to the arrangements Bolivia had with Peru as to the customs receipts is not clear. For example, that "When the right to these receipts was lost to Peru, what could Alsop & Co. expect by this arrangement?"

The exact arrangement which existed between the Governments of Bolivia and Peru regarding the collection and distribution of the customs receipts at Arica seem not to be fully understood by the Government of Chile. This matter was fully discussed in the Case of the United States, on pages 259 to 264, from which discussion it will appear that the conclusions above expressed are not wholly in consonance with the conditions as they existed.

STATEMENTS OF CHILEAN CASE.

"Moreover, the occupation of Chile benefited them in their status as creditors of Bolivia, as will be seen.

"According to the Pact of Indefinite Truce made between Chile and Bolivia in 1884, the receipts which the Arica Customs might produce in the possession of Chile were divided as follows: 25 per cent. was reserved by Chile for the expenses of the service of the said Customs, and 75 per cent. remaining was handed to Bolivia, she having to invest 40 per cent. in satisfying the indemnities that Bolivia owed to the Chilean citizens whose property she had confiscated, the balance of 35 per cent. remaining at Bolivia's free disposal.

"It would appear to follow that Alsop & Co., after the war, were actually in a better position than before in their relations with Bolivia; before the war they never succeeded in collecting any of the receipts of the Arica Customs which had been attached for the redemption of their claim; after the war Bolivia became entitled to receive, and in fact received for many years, a large share of these receipts, whereafter the guarantee given to Alsop & Co., illusory in its origin, became valid and effectual. Why did Alsop & Co.—why did the Government of the United States who protected them—never recover from Bolivia herself this claim, by enforcing the guarantee upon which so much belated reliance is apparently placed to-day?" (Chilean Case, pp. 26 and 27.)

The question put in the last paragraph by the Government of Chile may be briefly answered in the following manner:

The Government of the United States has never pressed the Government of Bolivia for the payment of the debt recognized in this contract for the following reasons: In the first place, the contract provided that the concessionaries were entitled only to that part of the customs receipts which exceeded 405,000 bolivianos annually. From the time Chile took possession of the Arica custom-house, about the middle of the year 1880, until the pact of truce of 1884, the Government of Chile appropriated all of the customs receipts of the Arica custom-house, giving none whatever to Bolivia. After 1884 Chile imposed upon the Government of Bolivia a distribution of the Arica customs receipts under an arrangement by which 65 per cent went either directly or indirectly to the Government of Chile—that is, 25 per cent was reserved to Chile for the service of the custom-house and to the part which corresponds to Chile for the dispatch of merchandise for consumption in Tacna and Arica (App. II, Case of the United States, p. 327), and the other 40 per cent was to be used, as stated

in the Chilean Case, "in satisfying the indemnities that Bolivia owed to Chilean citizens." The balance, 35 per cent, was the total amount at the disposal of Bolivia, and this amount, save in the one year 1885, when Bolivia's share amounted to 612,841 bolivianos, never exceeded by more than a few thousand bolivianos (entirely insufficient to meet the bare requirement of interest, to say nothing of the principal) the 405,000 bolivianos reserved to Bolivia. (App. II, Case of the United States, p. 369.)

Again, the Governments of Chile and Bolivia have always regarded, and have so expressed themselves in their formal treaties and stipulations, that the obligation due to Alsop & Co. was a charge on the Littoral; that it followed the Littoral, and that its solution should be made in accordance with the final disposition of that territory. Inasmuch therefore as the two Governments were constantly providing that this territory should be left in the hands of Chile, the Government of the United States has been willing that the Government of Chile should, pursuant to the arrangement between herself and the Government of Bolivia, pay this claim, and, having in mind the general conditions and circumstances attending the negotiations of the two Governments, the Government of the United States has always, as was pointed out in the Case of the United States (p. 350), been of the opinion that on broad principles of equity and justice the contract as well as the tort should be satisfied by the Government of Chile.

Again, the Government of Chile has, since 1884, continuously promised to settle the claims of American citizens arising out of the actions of the Government of Chile in the War of the Pacific (Case of the United States, p. 285), and in 1892 specifically promised, which promise has been periodically reiterated since that time, to settle this claim, principal and interest. (Case of the United States, p. 288 et seq.)

Finally, as has just been indicated, the Government of Chile has repeatedly undertaken with the Government of Bolivia, in formal treaties and protocols, to satisfy this claim, and the Government of Bolivia, when approached upon the matter and asked concerning it, has uniformly stated that this was a claim which had been taken over for adjustment by the Government of Chile.

Regarding the tort side of the claim, the Government of the United States has never presented it to the Government of Bolivia, for the reason that the Government of Bolivia had no part or

parcel in the liability for the damages suffered by reason of the tortious acts of the Government of Chile—the result of the action of the Chilean courts in the misapplication of the principles of international law. For this the Government of Chile is exclusively responsible. (Case of the United States, Point II, Sub-Points C to F, inclusive, p. 181 et seq.)

STATEMENTS OF CHILEAN CASE.

> "According to the declarations of the Claimants made before the Court of Washington, the Arica Customs in possession of Chile produced receipts sufficient to have paid several times over the claim of Alsop & Co., and if Bolivia did not liquidate this claim, it was certainly not because Chile took possession of these receipts." (Chilean Case, p. 27.)

As the paragraph of the Chilean Case quoted above has pointed out, the Government of Chile, by the provision of the pact of truce, controlled the distribution of 65 per cent of the customs receipts of the Arica custom-house, leaving 35 per cent to the Government of Bolivia, which share, with the exception of one year, barely exceeded the amount to which Bolivia was entitled under the Wheelwright contract. In view of these facts, declared in the Chilean Case, it is unnecessary to characterize the statement that "if Bolivia did not liquidate this claim it was certainly not because Chile took possession of these receipts."

STATEMENTS OF CHILEAN CASE.

> "It may be further recalled that in 1883 Chile concluded a Treaty of Peace with Peru expressly stipulating that Chile should continue to occupy as a sovereign the provinces of Tacna and Arica, and that this occupation, exerciseable according to Chilean laws, should not be fettered by any condition limiting the exercise of her sovereignty. So that, even supposing that Chile had no treaty with Bolivia, the treaty with Peru alone would have entitled her to appropriate the receipts of the Arica Customs." (Chilean Case, p. 27.)

Here, again, the learned counsel preparing the Case of the Government of Chile manifest what must be designated as a remarkable lack of acquaintance with the actual facts and conditions as they existed in this territory. As has been carefully pointed out in the Case of the United States (p. 259), Peru and Bolivia entered into an arrangement by which Peru collected at Arica, the point of debarkation of foreign goods going to Bolivia by way of the Pacific, the customs dues which Bolivia desired to levy upon such foreign goods so

imported into her territory through this port. This arrangement was a mere matter of treaty stipulation, which stipulation could be varied by the parties at their will. At the time the Government of Chile took possession of the port of Arica the treaty stipulation existing between Peru and Bolivia upon this matter provided merely that Peru should be given 5 per cent of the customs collected upon Bolivian goods for the services of her wharves, docks, etc. This in no wise created any absolute right in Peru to levy the customs duties for Bolivia. It is therefore wholly inaccurate, and entirely beside the point, to suggest that the treaty between Chile and Peru could confer upon Chile the right to collect and appropriate the *Bolivian* customs. If by the statement in the Case of the Government of Chile it is meant that Chile had the right by reason of her treaty with Peru to collect the customs upon goods coming into the Tacna and Arica districts, it is readily admitted that this is a fact; but it must also then be observed that this had nothing to do with Bolivian customs which Bolivia had a right to collect at her own frontier, and that therefore it would appear that this proposition is beside the point. It would seem that the reason for making any arrangement whatever upon this matter between Bolivia and Peru was the fact that it was easier to collect Bolivian customs at a seaport custom-house than at an inland custom-house upon the Bolivian frontier; hence the arrangement between Bolivia and Peru regarding the collection of Bolivian customs at the Arica custom-house.

STATEMENTS OF CHILEAN CASE.

> "Equally void of foundation is the argument of the Government of the United States based on the lawsuits Alsop & Co. maintained to support their rights to the 'estacas.'
>
> "It can be affirmed most categorically that the Government of Chile did not molest in the slightest degree Alsop & Co., either in the possession or in the working of the mines.
>
> "It is a fact that Wheelwright had lawsuits and difficulty in holding possession of the mines. Such actions, however, without exception, were against private persons, and he had to encounter the same difficulties and troubles whilst the mines were under the sovereignty of Bolivia, as is proved by the numerous plaints and claims that he presented to the Bolivian authorities to protect him in the possession of the mines.
>
> "The complaint, therefore, is ill-founded that Chile disturbed the enjoyment of these mines and the very existence of actions against private persons

> proves that, after the war, Alsop & Co. continued in possession of the mines and that they recognized the competence and were glad to appeal for the protection of the Chilean Courts.
>
> "The Government of the United States apparently charges Chile with having confiscated the mines worked by Alsop & Co. in conjunction with the Bolivian Government; but the pleadings presented by Alsop & Co. which Chile places at the disposal (if required) of the Royal Arbitrator prove the contrary; that is, that they continued to work the mines as if Bolivia, in whose name they held them, had continued to be their owner.
>
> "But the Government of the United States goes further in its charges and even maintains that Chile, after the occupation and recovery of the territory in which the mines were situate, had no right to subject their working to the Chilean laws, but ought to have treated the laws of Bolivia as still effective. Thus it says: The Chilean law obliges miners to keep up a certain minimum of work in the mines in order not to lose possession of them, and as this condition was more burdensome to Alsop & Co. than those imposed by the Bolivian laws, under whose sway they acquired their rights, Chile has caused damage to private property, contrary to the Law of Nations." (Chilean Case, pp. 27–28.)

The matters referred to in these paragraphs of the Case of the Government of Chile have been discussed at length in the Case of the United States under the heading of Point II, page 111 et. seq., to which reference is made for a complete and, it is believed, satisfactory answer to all of the allegations thus made by the Government of Chile. It was there set forth and substantiated by documents and legal authorities that the Government of Bolivia by and through the contract of 1876 duly, properly, and legally granted to the concessionaries under that contract certain rights, titles, and interests in the government estacas located in the Bolivian Littoral; that such rights, titles, and interests were in the nature of and constituted a concessionary grant analogous to a leasehold interest, which concessionary grant was under the contract to run for a term of twenty-five years; that the Government of Chile, upon taking possession and assuming control of the Bolivian Littoral, wrongfully interfered with and confiscated in a manner contrary to the well-established and universally recognized principles of international law certain of these vested rights, titles, and interests thus granted to the concessionaries under the contract of 1876, and that for this wrongful interference, deprivation, and

confiscation the Government of Chile is liable in tort to the Government of the United States for and in behalf of the claimants named. In the discussion of this point it was also explained that Wheelwright enjoyed in the government estacas for the purpose of occupation, possession, and exploitation the rights, titles, and interests which had been possessed by the State (Case of the United States, p. 181); that among the rights, titles, and interests so enjoyed by Wheelwright in such government estacas were (1) the right to hold said estacas free from the penalty of denouncement for abandonment and (2) the resulting freedom from the necessity of taking or remaining in possession of the estacas chosen and designated by him under his contract (Case of the United States, p. 185); that the Government of Chile violated and confiscated these all-important rights under his contract by applying to Wheelwright's rights, titles, and interests in said government estacas, held under and pursuant to his contract, the provisions of the Chilean law, under which law it became necessary for him to expend large sums to avoid the penalty of denouncement, and by the application and enforcement of such law he was deprived (improperly and illegally) of certain rich mines to which he was entitled under his contract (Case of the United States, p. 190); and, finally, that the application of the provisions of the law of Chile to the private vested rights held, possessed, and enjoyed by Wheelwright under his contract in a way and manner which amounted to and resulted in a deprivation and confiscation of these vested rights constituted a violation of the well-settled and universally recognized principles of international law that a conqueror must respect private rights, and that for this deprivation the Government of Chile is liable to respond in damages. (Case of the United States, p. 221.)

The various allegations of fact and contentions and arguments made in connection with these statements of principles were fully supported by documents as to facts and by legal authorities as to matters of law. His Majesty is therefore referred to the Case of the United States, *sub voce*, for a complete discussion of this branch of the case. From the discussion therein contained it will be seen that the Government of Chile did molest Alsop & Co. both in the possession and in the working of the mines and denied them some of their most valuable rights; that Alsop & Co. did, moreover, as is stated by the Government of Chile, "recognize the competence and were glad to appeal for the protection

of the Chilean courts," but the Chilean courts failed to grant them protection, and that they did not "continue to work the mines as if Bolivia, in whose name they held them, had continued to be their owner."

With reference to the statement of the Government of Chile that "the Government of the United States goes further in its charges and even maintains that Chile, after the occupation and recovery of the territory in which the mines were situate, had no right to subject their working to the Chilean laws, but ought to have treated the laws of Bolivia as still effective," it should be observed that while this does not precisely state the position of the Government of the United States, which position upon this point was fully set forth in Point II of the Case of the United States, yet the courts of Chile have recently handed down a decision which goes far to contradict the position which the Government of Chile has taken upon this point.

In a decision dated August 1st, 1910, given by the court of first instance at Santiago, Chile, in a suit by Don Carlos Aramayo and others against the State, *in re* nitrate properties in the Toco, which the plaintiffs claimed under a grant from Bolivia, it was clearly set forth that the rights in the nitrate properties there under discussion had to be determined not by the provisions of the Chilean law, but by the provisions of the Bolivian law, under and in accordance with the provisions of which they were granted. While the entire opinion is of the greatest interest and value in connection with this particular point, the gist of the legal decision is contained in the following extract:

> "5th. And whereas: The petition, therefore, refers to nitrate properties granted in 1873 by the Authorities of Bolivia and in accordance with Bolivian Jurisprudence in the territory which passed under the sovereignty of Chile in the Treaty of Peace and Friendship of the 20th of October of 1904, the Bolivian law must be applied to the case in conformity with Article IX of the Civil Code, the law of the 7th of October of 1861, and Article II of said Treaty, according to which 'there will be recognized by the High Contracting Parties the private rights of their citizens and of foreigners which might have been acquired legally in the territories which, in virtue of this Treaty, remain under the jurisdiction of one or the other country,' or, in other words, as to Chile, in the territories situated between the River Loa on the north and parallel 24° on the south, in conformity with the complementary protocol of said treaty dated November 15th, 1904."
>
> "20th. And whereas: The Government of Chile could neither have held possession 'animo domini' of the said lands, as the

administrative acts which it could have exercised in the nitrate zone before the treaty of peace and friendship made with Bolivia on October 20th, 1904, could only imply an uncertain possession derived from military occupation, or, in other words, an occupation by force of arms; and whereas in any case, in the same treaty she agreed to recognize the private rights acquired legally in this territory, and should be considered as rights legally acquired, as has been shown in the foregoing considerations, and not merely as simple claims, and which rights were derived from the registration of the petition for the estacas on a discovery already registered, to obtain the measurement and possession of the ground composing the estacas adjudicated in said register." (Appendix, p. 147.)

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"It is not proposed here to recur to the contention that Alsop & Co. never were rightful owners of these mines, any more than Bolivia; but in answer to this new charge of the United States a few observations will perhaps be sufficient. The United States after the war with Spain took possession of Puerto Rico; a private person had in the island properties which he acquired during the Spanish domination; let it be supposed that according to Spanish Law these properties were exempt from taxes; should they, therefore, be exempt in perpetuity from taxation under the laws of the United States?

"The inhabitants of the island were not obliged to attend school during the Spanish Administration; will they have a right not to attend school under the new domination? Will they have a claim against the American Government if compulsory attendance involves them in pecuniary expenditure?" (Chilean Case, pp. 28–29.)

Concerning the allegation that "Alsop & Co. never were rightful owners of these mines, any more than the Government of Bolivia," the Government of the United States desires to do no more than again to refer to the discussion of this point in the Case of the United States, page 130, in which this doctrine of *revindication* is carefully examined in the light of the history of Bolivia and Chile with particular reference to the ownership of the Littoral and in which the conclusion is reached, based upon the authorities, that prior to the pact of truce of 1884 the Government of Chile had no right or interest whatsoever in the Bolivian Littoral notwithstanding that in the treaty of 1866 the Government of Chile had, for reasons and in a manner which need not here be discussed, obtained from the Government of Bolivia the recognition that Chile was making claim to said territory.

Concerning the case put by the Government of Chile as to the treatment which might have been given to the residents of Porto Rico who had secured from the Spanish Government the right to be free from taxation, it is sufficient to say that neither the supposed case nor the principle involved therein has any relevancy to the matters under discussion in this case. In the first place, there is no analogy whatever between paying taxes and carrying out specified conditions of enjoyment under denouncement statutes, since the payment of taxes is necessary for the conduct of the business of the State and constitutes a part of the governmental methods and machinery, while the fulfilling of the requirements as to working mines in no wise adds directly to the income of the State, since, as has already been explained, it is a mere measure adopted by the State in order to make sure that mining properties shall not be held idle but that they may be developed.

Regarding the query as to what might happen to the inhabitants of the islands who were not obliged to attend school under the Spanish régime and might be compelled to attend under the American régime, it is submitted that no comment is necessary.

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> "But, even setting aside the legal aspect of the case, how could the maintenance of a minimum of work in the mines injure Alsop & Co.? None, since such mines were either good or bad; if the former, working them could not cause damage; if they were bad, the case is in any event grossly exaggerated. For the rest, it is well known that in the great mining centres, whatever the country in which they are situate (especially in those countries where mines are the property of the discoverers), there are always a great number of actions and difficulties among the miners; but it would occur to nobody to make the respective Governments responsible for the consequences of such litigation." (Chilean Case, p. 29.)

The Government of the United States admits that fulfilling the ordinary requirements of denouncement statutes, if the mines are good and paying, could cause no damage. The Government of Chile admits that if the mines were bad such working would cause damage, but adds that if they (the mines) "were bad, the case is in any event grossly exaggerated." The question as to whether or not the amounts are exaggerated is one of the points for His Majesty's determination. The Government of the United States

in its Case (Point IV, Sub-Point A, p. 340 et seq.) submitted a detailed statement regarding losses suffered by the concessionaries as a result of this feature of the Chilean law. (See also App. I, Case of the United States, p. 482 et seq.) The Government of the United States holds at the disposition of His Majesty the current account books of the operator of the mines in which the accounts are set forth in detail. The Government of Chile has also been notified that these books are held subject to her inspection and examination. (See Appendix, p. 27.)

Regarding the statements made by the Government of Chile that in great mining centers "there are always a great number of actions and difficulties among the miners, but it would occur to nobody to make the respective Governments responsible for the consequences of such litigations," it need only be said that wherever and whenever in such litigation, or in any other litigation, the courts of a government fail to give justice or err in the principles of international law which they apply, such erroneous judgments are, and always have been, a proper subject for diplomatic representation and, if necessary, for diplomatic intervention. The history of international arbitration is, for the most part, made up of litigations regarding matters previously passed upon by the courts of one or the other of the countries which are parties to the arbitration.

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> "It is not claimed that the Courts of Chile are infallible; but Chile may fairly claim that they have attained to a standard of capacity and integrity of which no civilized community need be ashamed, and that their Judgments merit the same respect as those of the Courts of any other country.
>
> "In every civilized country, all its inhabitants, whether natives or strangers, are subject to the laws and the Courts of the land." (Chilean Case, p. 29.)

The Government of the United States, in contending that the courts of the Government of Chile have in this matter given judgments out of harmony with and contary to the well-settled and recognized principles of international law, does not cast, and is not intending to cast, any reflection upon the independence, the honesty, or ability of the courts of the Government of Chile; on the contrary, the Government of the United States recognizes that the Chilean courts enjoy among their neighbors an enviable

reputation for the judicial temperament of the judges and for the generally just and righteous judgments which they pronounce. The Government of the United States simply contends that in this case those judges failed properly to understand, to invoke, and to declare certain fundamental and well-recognized principles of international law; that by reason of this fact they failed in this case properly to protect the property of American citizens; and that therefore the Government of Chile is liable to the Government of the United States for this default. This situation is, as pointed out above, not a new or strange situation, nor is this contention one that need produce in the Government of Chile any feeling of resentment. In this connection it might be well to recall that the Government of the United States has not infrequently submitted to international tribunals the judgments of its highest courts upon questions of international law; and it is not without interest to quote, as setting forth the position of the United States upon this matter, the words of the Honorable Elihu Root in an address before the American Society of International Law, in which he said:

> "No court in the world has greater power and independence and honor than the Supreme Court, established under the Constitution of the United States, yet our Government, by international agreement, has submitted to international tribunals many cases which could have been, and many cases which already had been, decided by that great court. For example, the cases of the *Peterhof*, reported in Wallace's Reports, volume 5; the *Dashing Wave* (5 Wallace); the *Georgia* (7 Wallace); the *Isabella Thompson* (3 Wallace); the *Pearl* (5 Wallace); the *Adela* (6 Wallace), had all been decided by the Supreme Court, and they were resubmitted to an international tribunal, which decided them in the same way the court had decided them.
>
> "The cases of the *Hiawatha* (2 Black), the *Circassian* (2 Wallace), the *Springbock* (5 Wallace), the *Sir William Peel* (5 Wallace), the *Volant* (5 Wallace), the *Science* (5 Wallace), had all been decided by the Supreme Court, and they were resubmitted to an international tribunal, which decided them adversely to the decisions of the court, and the United States complied with the decisions of the arbitral tribunal." (Proceedings of the American Society of International Law, Third Annual Meeting, p. 23.)

In view of these principles and of the practice of the United States, as stated by the Secretary of State in the quotation just made, it is unnecessary to do more than say that the Government of the United States recognizes as correct and acts upon

the principles laid down by Mr. Webster and quoted by the Government of Chile (Chilean Case, p. 29), but it desires to say that there is another and further principle not stated by Mr. Webster, though certainly understood by him, and this principle is, that where a municipal court delivers an opinion not in conformity with the principles of international law it is immaterial how honest, how dignified, or how impartial that court may be its judgments may be, at the option of the injured government, the subject of diplomatic adjustment.

It is certainly no argument in favor of the reasonableness and propriety of the judgment in this case to state that "the doctrines which the Chilean Courts applied to the Wheelwright case were the same as those applied to Chilean Plaintiffs in similar litigation." (Chilean Case, p. 30.)

As was stated by Mr. Bayard, Secretary of State, in an instruction to Mr. Buck, Minister to Peru:

> "It cannot be admitted that in every case the rights of a foreigner in that country [Peru] may be measured by the extent of the protection to person and property which a citizen might obtain. In times of civil conflict * * * it not infrequently happens that citizens of a country are compelled to endure injuries which would afford ample basis for international intervention, if they were inflicted on a foreigner." (Moore's Digest, Vol. VI, p. 252.)

It would moreover appear from these statements that the Government of Chile has not properly apprehended the ground upon which the judgment of the Chilean courts in this case are attacked. The attack is not, let it be said once for all, on account of any alleged partiality or lack of integrity or honor of the courts making the decision, but it is for the reason that, granting to the court all of these attributes, the court has, nevertheless, in the opinion of the Government of the United States, still failed properly to understand, to declare, and to administer the well-settled principles of international law, and it is because of this failure of the courts to deliver judgments in accordance with these principles, and because of the action of the Chilean Executive in adopting and enforcing these erroneous judgments of the Chilean courts, that the Government of the United States contends that in this case there has been a denial of justice which subjects the Government of Chile to liability for indemnity.

Chilean Point.—(E) Summary of Arguments.

The main points raised by the Government of Chile have been already sufficiently discussed to permit the following matters to be disposed of with a word:

STATEMENT OF CHILEAN CASE.

> "1. Both the receipts of the Arica Customs and the 'estacas' subject to the claim of Alsop & Co. were in the possession of hostile States and not of private persons and consequently Chile could lawfully confiscate them." (Chilean Case, p. 32.)

This is merely a statement of the contention that the rights held by the concessionaries under their contract were not private rights. It is submitted that it has already been established that they were private rights, and not public rights, and therefore that the arguments of Chile based upon this assumption must be considered as without force.

STATEMENT OF CHILEAN CASE.

> "2. Chile, having lawfully recovered the territory in which the said mines were situate, was thereafter under no obligation to recognize the contracts which Bolivia had made with Alsop & Co. for their exploitation." (Chilean Case, p. 32.)

This contention is founded in part upon the erroneous principle stated in point No. 1, just considered, and in part upon the further erroneous assumption that Chile was always owner of the Bolivian Littoral. The Government of the United States submits that there is no foundation in fact or in law for the *revindication* theory advanced by Chile. (See Case of the United States, p. 130.)

With reference to this question of *revindication* the Government of the United States submits, in addition to the documents and contentions already set forth in its Case, an extract from the opinion of the court of first instance at Santiago in the case of Don Carlos Aramayo and others against the State *in re* nitrate properties in the Toco, which, it is submitted, being a judgment of the Chilean courts, must be regarded as placing this point beyond question. In deciding in that case that the Bolivian and not the Chilean laws should apply to nitrate concessions granted by the Government of Bolivia in 1876 (prior to the occupation of the Littoral by the Chilean forces) the court said:

> "20th. And whereas: The Government of Chile could neither have held possession 'animo domini' of the said lands, as the administrative acts which it could have exercised in the nitrate zone before the Treaty of Peace and Friendship made with Bo-

livia on October 20th, 1904, could only imply an uncertain possession derived from military occupation, or, in other words, an occupation by force of arms; and whereas in any case, in the same Treaty she agreed to recognize the private rights acquired legally in this territory, and should be considered as rights legally acquired, as has been shown in the foregoing considerations, and not merely as simple claims, and which rights were derived from the registration of the petition for the estacas on a discovery already registered, to obtain the measurement and possession of the ground composing the estacas adjudicated in said register." (Appendix, p. 152.)

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"3. Even if Bolivia, as possessor of that territory, had the right to make these concessions to Alsop & Co., Chile was under no duty to respect them, as the claim did not arise from debts contracted by Bolivia for the special benefits of this territory, but for the general purposes of the whole of Bolivia, and Bolivia remained liable to pay Alsop & Co. from other sources." (Chilean Case, p. 32.)

This is merely the contention that the debt was not local, already discussed above in sufficient detail. Under the special circumstances of this case, the assumption that this debt was not local is without foundation in fact or law.

STATEMENT OF CHILEAN CASE.

"4. Chile, in fact, did not confiscate the mines in question and Alsop and Co. continued to work them as long as they liked." (Chilean Case, p. 32.)

The Government of the United States has not contended that the Government of Chile actually took any of the mines held by Wheelwright. It has contended that, as to the mines already in his possession, the Government of Chile refused to recognize the full interest which Wheelwright held under his contract of 1876, and, further, that the Government of Chile refused to put him in possession of certain other mines to which he had a clear title under the provisions of his contract with Bolivia.

STATEMENT OF CHILEAN CASE.

"5. If Alsop & Co. became involved in litigation against private persons and incurred losses and expenses on that account, Chile is not responsible either for the actions nor for the losses; for it has not been proved that there has been a denial or maladministration of justice." (Chilean Case, pp. 32–33.)

The Government of the United States contends, as has been set forth above and in its Case, that the claimants in this case

have suffered a denial of justice by reason of the failure of the courts of the Government of Chile properly to understand and administer justice in accordance with the principles of international law which governed in this case.

STATEMENT OF CHILEAN CASE.

> "6. Although Chile was fully entitled to appropriate the receipts of the Arica Customs, firstly, as warlike occupant, and subsequently, by virtue of the Treaty of Peace with Peru, she did not do so, but agreed to leave to Bolivia the 75 per cent. of those receipts to pay her creditors, and if they did not enforce payment or if the indebted Government denied it them, no responsibility falls therefore upon the Government of Chile." (Chilean Case, p. 33.)

As to the statements herein made, the Government of the United States must submit in all seriousness that this statement does not conform to the actual facts of the case. Under the arrangement with Bolivia 65 per cent of the customs receipts went to Chile and to Chilean citizens, leaving but 35 per cent for Bolivia, and it might, in this connection, be recalled to the attention of His Majesty that, notwithstanding the Government of Chile was thus requiring that the Government of Bolivia apply to the debts of citizens of Chile 40 per cent of her customs receipts, not one cent of these customs receipts was ever offered to or ever received by Alsop & Co., notwithstanding that the Government of Chile now contends that the company constituted a Chilean citizen. No explanation has ever been offered for this discrimination.

STATEMENT OF CHILEAN CASE.

> "7. Chile has a perfect right to legislate over its own territory, and those laws which do not injure existing individual rights themselves but which only change the conditions under which they can be enjoyed must be conformed to by all inhabitants, whether they be natives or foreigners." (Chilean Case, p. 33.)

The Government of the United States admits the principle announced in this statement and contents itself merely with remarking that it has no application whatever to the present case, since in this case the question was not as to the mere change of the conditions under which the rights might be enjoyed, but as to the failure to recognize the rights themselves.

Chilean Point.—(F) Chile's alleged Promise prior to the Treaty of 1904.

The many promises given prior to the 1904 treaty by the Government of Chile to the Government of the United States and to the Government of Bolivia have been set forth in detail under Sub-Points B and C of Point III of the Case of the United States, pages 270–314.

The Government of Chile has, in connection with this point, submitted no documents or evidence whatever, and the Government of the United States therefore considers that its statement of the case as already made will suffice upon this matter.

It will be seen from the discussion, already made in the Case of the United States (p. 270), that on various occasions the Government of Chile promised to the Government of Bolivia in formal protocols and treaties to satisfy this obligation running from Bolivia to the concessionaries under the contract of 1876; and, further, that the Government of Chile likewise repeatedly promised the Government of the United States both in general and specific terms to meet this obligation running to the citizens of the United States.

Regarding the further statement in the Case of the Government of Chile that "the United States affect to treat as a source of obligation for Chile certain verbal declarations gathered by their Diplomatic Agents from an Under-Secretary of Chile's Department of Foreign Affairs" (Chilean Case, p. 34), the Government of the United States respectfully refers to the fact that the promises relied upon by it were made not by "an Under-Secretary of Chile's Department of Foreign Affairs" but by the various Ministers of Foreign Relations for Chile from 1892 to 1904, who, in repeated formal diplomatic communications to the American diplomatic representative at Santiago, as well as by the duly appointed and accredited agent of the Government of Chile before the United States and Chilean Claims Commission, promised to pay this debt. As a matter of fact, only one reference is made to any promise by an Under-Secretary of Foreign Relations, and that was put forward merely to show that the interest item of the contract debt recognized by the Wheelwright contract was thoroughly understood by the Government of Chile, and that it was that Government's intention to pay the interest as well as the principal. This statement of the Under-Secretary might well be eliminated so far as the case of the Government of the United States is concerned and yet leave

the case thoroughly established upon the basis of a diplomatic undertaking.

As to the right of diplomatic representatives to pledge the faith of their governments in formal diplomatic correspondence, or in agreements with private individuals, the Government of the United States begs again to invite the attention of His Majesty to the case of *Trumbull* v. *The United States*, in which case the United States and Chilean Claims Commission gave an award to a Chilean citizen upon the strength of a contract for services made by the American representative at Santiago, the contract being made without authority from his Government; and to the *Metzger case*, in which the Government of Haiti was held to certain promises made by its Minister of Foreign Relations. (Case of the United States, pp. 309–312.) It need only be added that the intercourse of nations will become impossible if the plighted word of the nation given through its diplomatic agents, the customary means of communication with foreign governments, is to be regarded as the mere expression of personal opinion having no international force or significance.

After having called attention, by way of presumed analogy to the present case, to certain communications made to the Congress of the United States by various Presidents of the United States in which these Presidents recommended that Congress appropriate certain money to pay certain claims made by aliens against the Government of the United States, the Government of Chile concludes, "if this has been the practice of the United States with regard to unratified promises of their Secretaries of State, the messages of several of their Presidents, and Conventions signed by representatives of their country with those of another Power, with what plausibility can they impute to Chile obligations founded on unratified agreements, or upon the conditional promises of her Ministers." (Chilean Case, p. 35.) Granting for the moment that the Government of the United States had in the past failed properly to observe the principles of international law, which are now invoked against the Government of Chile, it is confidently asserted that that could have no force or relevancy whatsoever upon the question as to whether or not the Government of Chile should meet its just obligations in this case. It is no excuse to a suit brought upon a debt by A against B for B to say that A owes C a debt which he, A, has not paid. As the learned reporter chronicles in *Read* v. *Dawson*, 2 Mod., 140, Scruggs, J., asked, merrily, "If debt be brought upon a bond,

and the defendant plead that Robin Hood dwelt in a wood, and the plaintiff join issue that he did not, this is an immaterial issue, and shall there not be a repleader in such case after verdict?—*ad quod non fuit responsum.*"

As a matter of fact, however, there is no similarity whatever between the instances cited in the Case of the Government of Chile and the present case. In no one of the cases cited by the Government of Chile had the Government of the United States, or any officer thereof, ever promised a foreign government, or anyone else, to pay the claims at issue in the instances cited. In this connection it may be remarked that American Secretaries of State too well realize their constitutional inhibition to undertake definitely to promise the payment of claims, since they know that they have not at their command the means with which to pay such claims. In each of these cases to which reference has been made by the Government of Chile there is nothing but the recommendation of the President of the United States to the Congress that the money be paid, or a bare statement by a Secretary of State that a certain claim seemed to be founded in justice, but no promise to pay and no semblance of such a promise—an entirely different situation from that which arises where, as in this case, an officer conducting the foreign relations of a government, in an official and formal communication, promises the representative of another government that certain claims will be paid.

Chilean Case, Part V.—Chile's Obligations under the Treaty of 1904.

Running through this entire section of the Case of the Government of Chile is the thought, often expressed, that the Government of the United States has absolutely no concern in the treaty of 1904 between Bolivia and Chile, which provided that Chile should settle this claim of these American claimants, and that it may not inquire into or express an opinion upon the meaning of said treaty; and this thought is coupled with the assumption that the present rights of Alsop & Co. are now to be measured entirely by the extent of the obligation recognized by the treaty of 1904, *as interpreted by the Government of Chile*, who is but one of the parties thereto.

It is interesting in connection with this idea which the Government of Chile now puts forward in this case to consider in contrast the statements of that Government regarding a not dissimilar situation which arose between the Governments of Chile and Bolivia just prior to the War of the Pacific. In a circular note dated February 18, 1879, addressed by the Government of Chile to the various foreign ministers at Santiago (App. II, Case of the United States, p. 263), the Minister of Chile, referring to a similar situation, set forth the principle upon which it was then acting (and which it is submitted is the true principle which must govern and control in such cases) in the following language:

> "Your Excellency will not have forgotten, perhaps, that by this article [Art. VII of the Treaty of 1866] both Republics obligated themselves to indemnify certain persons who while laboring in the desert had been somewhat injured in consequence of the controversy respecting the limits which existed between both nations. In accordance with this compromise Chile and Bolivia should have each handed, by equal half parts the sum of eighty thousand dollars to the injured parties, which sum should have been raised out of the ten per cent of the product of the guano sales. Chile punctually paid that sum, but Bolivia delayed its payment under various pretexts, and now pretends that she does not owe it because her obligation disappeared since the treaty of 1874 abrogated that of 1866, *without taking into account that a compact intended to create or to modify the obligations of two countries, can not destroy the rights of third parties who have not been consulted about it nor have intervened in it.*" (App. I, Case of the United States, pp. 276–277.)

The Government of the United States invokes and stands upon the principle thus announced and acted upon by the Government of Chile in that case, and asserts without fear of successful contradiction that it is a legal impossibility for A, who owes B, to make such an agreement with C as will, without B's participation or consent, lessen or destroy the debt due from A to B. Inasmuch as Chile is now attempting to say that the treaty of 1904, between herself and Bolivia, to which neither the claimants themselves nor the Government of the United States is a party and concerning which neither was consulted, operates to reduce the amount due upon this debt, the application of this principle is obvious.

The true principle being as thus stated by the Government of Chile and the parties affected by the treaty of 1904 being, as they are, American citizens who had no part or parcel in the making of such treaties, the Government of the United States must contend, in the first place, that the rights of American claimants can in no wise be prejudiced by any arrangement which may be made between the Governments of Bolivia and Chile, and in the next place that when a treaty between these two Governments is invoked by either or both of said Governments as a justification for an attempt to alter in any way the rights due to Alsop & Co., from or on the part of either or both of said Governments, it is the high right and sovereign prerogative of the Government of the United States to examine into the treaty thus invoked, in order to determine the exact effect of such treaty upon its citizens and their rights, so that it may arrive at the just measure of the obligations which such treaty may impose.

In considering the extent of the obligation which the Government of Chile assumed or undertook to assume under the treaty of 1904, it is not without interest to note the two contradictory attitudes which it has taken in the presentation of its Case to the attention of His Majesty. The position of that Government upon that question is in the first instance set forth as follows:

> "Chile's only obligation arising from the Treaty, as approved by the Congresses of both contracting parties, and as proclaimed by the Governments of both, consists in the appropriation of a certain lump sum to the cancellation of certain claims, among which figures that of Alsop & Co., and, as has been so often stated, Chile has always been ready to fulfil her obligation, either by offering to Alsop & Co. the delivery of the sum due according to the Treaty, or by placing such a sum at the disposal of Bolivia." (Chilean Case, p. 39.)

It would appear that this statement of the position of Chile involves four essential points: (1) That Chile had assumed some liability with reference to this claim; (2) that this liability was limited to the pro rata share of the 2,000,000 pesos specified in the treaty articles and no more; (3) that the Chilean Government stood ready to pay this sum to the claimants in discharge of the obligation; (4) that if the claimants were not satisfied to take such pro rata share the Government of Chile would pay the same to the Government of Bolivia, leaving that Government to make settlement of the claim; and (5) as growing out of and involving the other four, there was no intention or pretense that this was the total value of the claim or bore any necessary relation thereto.

This states accurately the earlier position of Chile regarding this question as that position was set forth in a conversation between the American Minister at Santiago and the Minister of Foreign Relations of Chile on October 24, 1903, when the Chilean Minister of Foreign Relations, referring to an offer which the Chilean Government was prepared to make to the claimants, stated that—

> "If the same was not accepted, the amount tendered would be handed over to Bolivia, and the Alsop creditors, together with such others as might decline to accept a direct cash settlement with Chile, would be remanded to La Paz for the consideration of the Bolivian Government." (App. I, Case of United States, p. 80.)

This position was reiterated on December 4, 1903, when the Chilean Government stated that "should the claimants decline this offer [954,285 Chilean pesos of 18d.] the Government of Chile will pay this sum in Chilean bonds to the Bolivian Government, which will then assume responsibility and settle with the claimants." (App. I, Case of the United States, p. 80.)

That is, to repeat, the position of the Government of Chile at this time was that it was only liable for the amount named by it, and that if the claimants were not satisfied with this amount as a liquidation of their entire claim they, with others who might be dissatisfied, were to be referred to the Government of Bolivia for the complete liquidation of their claims, the Government of Chile not undertaking to pass in any way upon the value of the debt or to say that the part it signified its preparedness to pay bore any necessary relation to such value.

Later in its Case, however, the Government of Chile appears to assume a second and contradictory position, which it states as follows:

> * * * "The only object, therefore, of the parties when they agreed that Chile should take upon herself the responsi-

> bility of paying these claims was to eliminate every kind of future difficulty between the two Governments. For this purpose Chile considered Bolivia free from responsibility with regard to them, and promised not to undertake ulterior action in favor of the creditors concerned." (Chilean Case, p. 40.)

This statement, taken in connection with the earlier one that "Alsop & Co. being a Chilean firm, both Governments assumed that Chile alone could submit a claim to Bolivia for any of the claimants in question," seems to indicate that the Government of Chile had assumed the entire liability existing on the part of Bolivia toward Alsop & Co., and, secondly, and as a necessary conclusion from this, that by this action of the Governments of Bolivia and Chile they had arbitrarily reduced the extent of the liability due to Alsop & Co., so as to make it adjustable by payment of a pro rata share of the 2,000,000 pesos stipulated in the treaty of 1904. This, moreover, appears to be the position which the Government of Chile has taken in the later diplomatic correspondence passing between the Governments of the United States and Chile regarding this claim. For example, in August, 1907, the Chilean Government declared that the sum offered "will be paid upon the express condition that acknowledgment of the full amount of the claim be made by claimant, thus canceling the indebtedness of both the Government of Chile and that of Bolivia." (App. I, Case of the United States, p. 108.) In connection with this statement of the Government of Chile it should be observed that there is a distinct recognition at this time that both Governments were still liable. The Government of the United States can only conjecture regarding the reasons which induced the Government of Chile to take this latter attitude, but might it not be a feeling that under the "secret" notes which are now sought to be repudiated, the Government of Chile considered itself as solemnly bound to secure the full and complete payment of this claim.

It is believed to be unnecessary to repeat in extenso those arguments regarding the meaning of the treaty between Bolivia and Chile of October 20, 1904, or of the extent of the liability imposed by the treaty and the so-called secret notes which accompanied it, which were set forth with some fullness in the Case of the United States. (Introductory Statement, p. 36; Point III, Sub-Point B, p. 227 et seq.) It will, however, be observed from the discussion therein made that this Government contends that whatever might seem to be the limitation upon the liability of Chile from the wording of article 5 of the treaty itself, yet

when that article is taken in connection with the so-called "secret notes" it must be considered that if the notes are to be given any value whatever the liability of Chile must be regarded as unlimited.

It will be recalled that the treaty provides (article 5) that the "Republic of Chile devotes * * * 2,000,000 pesos in gold of 18 pence each, payable in the same form as the last mentioned, for the cancellation of the debts arising from the following Bolivian obligations" * * * (naming them and including the Alsop claim). In the so-called "secret notes" the following expressions were used. The Bolivian Minister, writing to the Chilean Minister of Foreign Relations, stated:

> "In regard to the claims against Bolivia * * * of Alsop & Co. (assignees of Pedro Lopez Gama), * * * it has been agreed that the Government of Chile shall permanently cancel all of them, so that Bolivia shall be relieved of all liability, the Government of Chile being obligated to answer every subsequent claim presented either by private means or through Diplomatic channels, and considering itself liable for every obligation, bond, or document of the Government of Bolivia relating to any of the claims enumerated, Bolivia's liability being entirely eliminated for all time and the Government of Chile assuming all liabilities to their full extent.
>
> "My Government desires that your Excellency may be pleased to state to me, on behalf of the Government of Chile, whether this is the purport which it has given to article 5 of the Treaty of Peace and Friendship signed to-day between the representatives of the two Governments." (App. I, Case of the United States, p. 444.)

To this the Chilean Minister replied:

> "MR. MINISTER: In reply to the note which Your Excellency addressed to me on this day *I take pleasure, in compliance with your request, in defining the purport which this Chancellery assigns to clause 5 of the Treaty of Peace and Friendship signed to-day by Your Excellency in representation of the Government of Bolivia and by the undersigned on behalf of the Government of Chile.*
>
> "*My Government considers that the obligation which Chile contracts by Article 5 of the said Treaty comprises that of arranging directly, with the two groups of creditors recognized by Bolivia, for the permanent cancellation of each of the claims mentioned in said article, thus relieving Bolivia of all subsequent liabilities.*
>
> "*It is consequently understood that Chile, as successor of all the obligations and rights which might be incumbent on or pertain to Bolivia in connection with these claims, shall answer any reclamation which may be presented to Your Excellency's Government by any of the parties interested in the said claims.*" (App. I, Case of the United States, pp. 444–445.)

No restatement of the ideas thus expressed; no argument, however profound, and no discussion, however complete, could render more clear that it was intended by the parties negotiating this treaty that although apparently under the mere treaty provision the liability of Chile was to be limited to the amounts named therein, nevertheless in reality the liability of Chile was to be limited only by the actual amounts due the various claimants on their contracts. The Government of the United States therefore considers that it ought to be unnecessary to enter into any extended analysis or discussion of these provisions, but inasmuch as the Government of Chile seems inclined to press this matter of the repudiation of the action of its Minister of Foreign Relations and to contend that these notes are without international significance or value, it appears necessary to discuss this matter with considerable fullness even at the risk of becoming wearisome.

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> "But on what grounds can it be contended that Chile is bound to pay more than her share under the Treaty, which, as has been often shown, is the only source of her obligations towards Bolivia with regard to the Alsop claim? Perhaps according to the Notes of the 20th October, 1904? But it has already been stated that these Notes are the confidential and exclusive negotiations of the Ministers who signed them and no foreign Power can make use of them. *Quoad* the United States they are *res inter alios actæ*. (Chilean Case, p. 40.)

It would thus appear that the Government of Chile attaches no little importance and is inclined to place some considerable reliance upon the fact that these notes were presumably "secret" and confidential. Whatever might be the value of this contention, had the notes actually been "secret" or confidential, is, however, entirely destroyed by considering the fact that these notes were neither "secret" nor confidential because certainly as early as February 17, 1905, they were published in the daily papers of Bolivia in their entirety under the heading of "Las Notas Reversales." It would appear, moreover, that the Bolivian Congress approved the treaty under date of February 4, 1905, and that the same was proclaimed by the Bolivian Government under date of March 10, 1905, on which date ratifications appear to have been exchanged. (See App. I, Case of the United States, p. 443.) It is thus clear that immediately after the approval of the treaty by the Bolivian Congress, and before its formal proclamation, and before the

exchange of ratifications, these notes had been published to the world as constituting a part of the treaty, and were evidently so understood by the Bolivian Government and by the Bolivian people. Yet, notwithstanding this publication in the public press of Bolivia, which, it must be presumed, certainly came, because of its vital importance, to the attention of the Government of Chile, the United States has not been able to find that one public word of protest because of the publication, or one word of caution, disavowal, or dissent because of the use made of, or the meaning attached to, the notes by the Government of Bolivia has before this ever been uttered by the Government of Chile or by any of its officers.

Moreover, these notes have since been printed by the Government of Bolivia in an official volume entitled "Anexos de la Memoria presentada por el Ministro de Relaciones Exteriores (1908)," which volume contains the treaties celebrated by Bolivia with other powers and constitutes a part of the official report of the Minister of Foreign Relations to the Bolivian Congress, the book, therefore, being a public document. (See App. I, Case of the United States, p. 420.) It would appear, therefore, that all arguments based upon the alleged fact that these were secret and confidential notes must fail since, as the Government of Bolivia itself has stated, the notes "are not secret."

Moreover by virtue of a specific request dated July 31, 1906, made by the American minister at La Paz pursuant to instructions issued on June 15, 1906, the Government of Bolivia furnished to the United States formally and officially copies of the said notes.

In the next place it is contended by the Government of Chile as follows:

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* * * * *

> "In any case these Notes are irrelevant, in view of the fact that the Treaty which was ratified after them by the Congresses of each country does not embody the sense which the United States seek to ascribe to the Notes. Could the confidential documents of the two diplomatic agents oblige their principals to more than had been agreed in the public documents which were the outcome of these private documents? By what right, in virtue of what power, could these agents bind their Governments under such circumstances?" (Chilean Case, p. 41.)

This contention regarding the effect of a diplomatic arrangement will be first discussed in the light of precedent.

It would seem clear that two plenipotentiaries negotiating a diplomatic arrangement have power to bind their respective governments by their conclusion and signature of a diplomatic agreement. This question, in a slightly different connection, was (as has just been stated) fully discussed in the Case of the United States, Point III, Sub-Point C, page 309 et seq., where, it will be recalled, reference was made to the case of *Trumbull* v. *The United States*, a case in which Trumbull, a Chilean citizen, sued the United States for services performed under a contract made with him by the American Minister at Santiago, which contract had not been authorized by the Government of the United States. In pronouncing the opinion in that case, which was heard before the United States and Chilean Claims Commission in 1892, the commission unanimously formulated the principle upon which they based their decision as follows:

> "As a representative of the United States he made, as is confessed by the demurrer, a promise in the name of his Government, which, according to the rules of the responsibility of Governments for acts performed by their agents in foreign countries, can not be repudiated." (Case of the United States, p. 310.)

It was, moreover, pointed out in the Case of the United States that this Trumbull case has since been followed in the case of *Metzger & Co.* v. *Haiti*, in which Mr. Justice William R. Day, the arbitrator in the case, held, regarding a promise made by the Secretary of State of Foreign Relations of Haiti, that—

> "I am of the opinion that this arrangement agreeing to settle Metzger & Co.'s grievances, promptly accepted by the Secretary of State for Foreign Relations of Haiti, followed by the assurance of the secretary, conveyed by the minister to the State Department at Washington, that the matter had been settled within twenty-four hours, constituted a diplomatic agreement between the two countries which, upon settled principles of international law, should have been carried into effect.
>
> * * * * *
>
> "It can not be that good faith is less obligatory upon nations than upon individuals in carrying out agreements.
>
> * * * * *
>
> "I do not understand that the limitations upon official authority, undisclosed at the time to the other government, prevent the enforcement of diplomatic agreements." (Case of the United States, p. 311.)

So far therefore as precedent is concerned these notes, which have stood unrepudiated until the present time, must be regarded as binding upon the two Governments.

The question of the status of these notes should also be considered from the standpoint of the intention of the parties. In this connection it must certainly be considered that the representatives of two governments, engaged in the negotiation of a treaty affecting so vitally the interests of both governments, would not do a vain and unnecessary thing, and it must be, therefore, that they intended that the notes should have some force and validity, and if these notes have any meaning whatever it must be that they define the meaning and the scope of the treaty provision to which they relate.

With reference to the contention of Chile that these notes were not submitted for ratification to the Congresses of the two Governments, it should in the first place be observed that it would seem from the manner in which the notes appear in the official publication of Bolivian treaties that they might well have been submitted and acted upon by the Bolivian Congress along with the treaty, although if they were intended to be strictly secret notes they might not have been formally placed before the respective legislatures and acted upon with the same formality as attends the ratification of a treaty. But whatever the fact may be as to the ratification of these notes by the two Congresses, the Government of Bolivia has always insisted to the Government of the United States that these notes were legal and binding and a part of the treaty undertaking and that Government has invoked them for the purpose of showing that the Government of Chile had assumed the entire and unlimited responsibility for the satisfaction of the claims mentioned in the treaty.

In this connection it is not without interest and value to consider the conditions which the Government of Bolivia has regarded as the *sine qua non* to the negotiation of any final treaty whatsoever between herself and the Government of Chile, which conditions have been the subject of discussion for a great many years between the two Governments, during which time they were made entirely clear by the Government of Bolivia and must have been perfectly understood by the Government of Chile. Without attempting to enter into any elaborate discussion of the early negotiations which took place between the two Governments upon this general subject, the Government of the United States believes that the attitude of the respective Governments toward the entire treaty (*prior* to its negotiations), as well as toward the question of the payment of the debt owing by Bolivia to Alsop & Co., may be gathered from the following extract of a note presented, by the Minister

of Chile at La Paz, to the Minister of Foreign Relations of Bolivia under date August 13, 1900, and, judged from the standpoint of the frankness with which it sets forth the views of the Government of Chile upon the entire questions under discussion, it is believed that it may, perhaps, be regarded as unique.

The parts pertinent to the present question read as follows:

[Translation.][a]

"LEGATION OF CHILE,
"*La Paz, August 13, 1900.*

"To His Excellency, the Minister of Foreign Relations of Bolivia,
"Mr. ELIODORO VILLAZÓN.

"Mr. MINISTER: From Your Excellency I have learned the determination of the Government of Bolivia to leave to the National Congress the consideration and resolution of our proposals for a settlement, and in order to facilitate both, I have the honor to place in Your Excellency's hands the present communication, which contains a minute explanation of the final bases for peace accepted by my Government.

"Since these bases are to be submitted to the judgment of the Bolivian Congress, I have deemed it expedient that the representatives of the people should have a full knowledge of its text and the reasons which justify it.

"In compliance with the instructions from my Government, and starting from the antecedent accepted by both countries, that the old Bolivian littoral is and shall always remain Chilean, I had the honor to submit to Your Excellency the following bases for a Treaty of Peace and Amity:

"The Government of Chile will be disposed, in order to conclude the Treaty of Peace with Bolivia, to grant, in exchange for the definite cession of the Bolivian littoral we now occupy by virtue of the Pact of Truce, the following compensations:

"(*a*) *To take upon themselves, and to bind themselves to the payment of the obligations contracted by the Bolivian Government with the mining enterprises* of Huanchaca, Corocoro, and Oruro, and the balance of the Bolivian loan contracted in Chile in 1867, after deducting such amounts which have been credited said account, according to Art. 6 of the Treaty of Truce.

"*Chile could also, in the same manner, pay the following liabilities affecting the Bolivian littoral:* The one corresponding to the bonds issued for the construction of the railway from Mejillones to Caracoles; *the liability in favor of Mr. Pedro Lopez Gama, at the present time represented by the house of Alsop & Co., of Valparaiso;* that of Mr. Enrique Meiggs, represented by Eduardo Squire, resulting from the contract the former made with the Government of Bolivia on May 20, 1876, for the lease of the fiscal nitrate beds of Toco, and the one recognized in favor of the family of Mr. Juan Garday. These liabilities will be the object of a particular liquidation and of a detailed specification in a supplementary protocol.

[a] For Spanish text of this note see App. II, Case of the United States, p. 460 et seq.

"(*b*) An amount of money to be fixed by mutual agreement between both governments, to be invested in the construction of a railway which shall either connect any port in our coast with the interior of Bolivia, or be the prolongation of the present Oruro Railway. In the judgment of the undersigned, this amount must not exceed six million *pesos*, and the determination of the starting and terminal points as well as the plans and other conditions of the railway to be resolved by mutual agreement between both governments.

"(*c*) The port selected as starting point of this railway shall be declared free for the products and merchandise shipped through it in transit to Bolivia, and for the Bolivian products and merchandise exported through the same.

"In the several conferences I had with Your Excellency, while analyzing the foregoing bases, Your Excellency informed me that in his judgment the concessions offered were not compensation enough for the Bolivian littoral, and that Bolivia needed a port and absolute commercial freedom. The Bolivian Government regards the Pact of Truce, which exceptionally favors Chilean commerce, as burdensome to Bolivia, and that it has given rise to claims on the part of European powers. Bolivia aspires to her commercial independence as a consequence of her political independence, and wishes to remain at liberty to reject the treaties which are detrimental and to make those which are convenient to her, this not being meant as a hostile feeling against Chile, as it is understood that thereafter Bolivia shall grant Chile the commercial franchises granted to other nations.

"Several days after this, and as the natural result of the conferences, Your Excellency communicated to me the propositions agreed to by the Government, which are the following:

"'*The Government of Chile takes upon themselves the obligations contracted by Bolivia with the mining enterprises of* Huanchaca, Corocoro, and Oruro, and the balance of the Bolivian loan contracted in Chile in 1867. *They will also take upon themselves the following liabilities which burden the Bolivian littoral:* The one corresponding to the bonds issued for the construction of the railway from Mejillones to Caracoles; *the liability in favor of Mr. Pedro Lopez Gama;* that of Mr. Enrique Meiggs, resulting from the contract made with Bolivia in 1876 for the lease of the fiscal nitrate beds of Toco, and the one recognized in favor of the family of Mr. Juan Garday."

The entire note is well worth a careful perusal because of the frankness with which it sets forth the motives which its writer stated had guided Chile in the past, and the intentions which that Government had for the future, and, lest it might be assumed that these were but the expressions of an overzealous diplomatic representative, attention is called to the following statement regarding this note made by the Government of Chile in a circular note

addressed to the Chilean diplomatic corps under date of January 11, 1901. This statement reads as follows:

> "Our Plenipotentiary Minister in La Paz addressed to the Bolivian Foreign Office his above-mentioned communication of August 13, 1900, in obedience to those instructions which expressed this Government's unalterable policy, a policy which it will consistently maintain until the solution of the problem is reached, a policy resulting from the painful experience of seventeen years and from the rooted conviction that to deviate from it is tantamount to abandoning the only way that leads to a complete settlement." (App. II, Case of the United States, p. 529.)

In the reply of the Bolivian Department of Foreign Relations, dated October 15, 1900, the Minister of Foreign Relations formally presented the contentions of the Government of Bolivia upon the matter discussed in the Chilean note.

But not only did Minister Konig indicate in his note that the cession of the Littoral by Bolivia meant the assumption of the obligations "encumbering" the same by Chile, but from that time until the negotiation of the treaty the Government of Bolivia firmly insisted that such an assumption was a condition precedent to the signature of any treaty of peace, and since the treaty of 1904 the Government of Bolivia has constantly insisted that a complete assumption of such debts was undertaken by the Government of Chile and has cited and relied upon the so-called "secret notes" as supporting her in her contention. The American Minister at La Paz, in reporting to the Secretary of State, under date of May 27, 1903, a conversation between himself and the Bolivian Minister for Foreign Affairs stated that—

> "The Bolivian Minister for Foreign Affairs is emphatic in saying that the treaty will not be signed unless Bolivia is relieved of all responsibility respecting all of the claims relating to the Chilean occupation of the Bolivian territory on the Pacific." (Appendix, p. 7.)

Again, under date of November 30, 1904, one month after the conclusion of the treaty of October 20, 1904, under which the Government of Chile seeks to limit her liability, the American Minister at La Paz informed the Secretary of State that—

> "Upon the receipt of the Department's message of the 24th instant, I went directly to the Bolivian Minister for Foreign Affairs, and he gave me the information upon which my message of the 25th instant was based. He also explained that while the clause in the treaty by which Chile assumed respon-

sibility of the claims against Bolivia stated the amount to be 6,500,000 pesos at 18d., the creditors who did not wish to accept the resultant pro rata could have recourse to the tribunals or to diplomatic action; and that there was really no distinction with respect to the creditors, although 4,000,000 pesos at 18d. was stated as pertaining to one group and 2,500,000 pesos at 18d. was stated as pertaining to the other (Pedro Lopez Gama or Alsop) group.

"Chile's motive in having the total of her responsibility stated at 6,500,000 pesos at 18d. is evidently to coerce the creditors into the acceptance of that sum.

"Doctor Villazon, Bolivian Minister for Foreign Affairs, under the former administration, resisted every effort by Chile to have any given amount for which Chile should become responsible stated in the treaty then under discussion, unless a distinct provision should follow that in no event should Bolivia be liable for any part of the claim against her based upon the results of the war of 1879–80." (Appendix, p. 8.)

Again, under date of December 8, 1904, the American Minister at La Paz informed his Government that—

"I have the honor to report that Doctor Villazon, ex-Minister for Foreign Affairs, and the actual First Vice-President of the Republic, stated to me on the evening of the 5th instant that in a recent conversation with President Mentes, relative to the pending Chilean-Bolivian Treaty, in its relations to the claims against Bolivia, referred to by said treaty, he was assured that an arrangement existed with Chile whereby Bolivia was exempted from all responsibility with respect to said claims." (Appendix, p. 9.)

On September 28, 1906, the American Minister reported to the Secretary of State by cable a conversation with the Bolivian Minister for Foreign Affairs in which that Minister said:

"That as a result of the treaty of October 20, 1904, he considers the liquidation of all the claims referred to in the treaty pertains exclusively to Chile and in defense of his position probably refers to notes exchanged at Santiago, October 21, 1904, between Bolivian Minister Gutierrez and the Chilean Minister for Foreign Affairs, defining purport of article 5 of the treaty." (App. I, Case of the United States, p. 36.)

On September 28, 1906, the American Minister transmitted to the Department of State a copy of a communication received from the Minister for Foreign Affairs of Bolivia in which that official set forth the position of the Government of Bolivia in the following language:

"In reply I beg to advise Your Excellency that my Government has always considered that the responsibilities derived from obligations affecting the coast territory have followed the

fortune of that territory and should be assumed by the holder thereof the products of which have been enjoyed exclusively thereby, and that the generic responsibility founded on the general principles of law has assumed a positive character by the consummation of the Treaty of October 20, 1904, celebrated precisely with the object of settling all questions arising out of the cession of territory there contemplated and among them in a specific manner the credit of Messrs. Alsop & Co. by virtue of which, the same efforts which Your Excellency mentions in the Despatch under reply are proofs of the perfect and absolute understanding of the stipulation referred to, efforts which will surely result satisfactorily in view of the justice and equanimity of the Governments of Chile and the United States.

"For these reasons and in the hope of contributing to a prompt understanding between the Governments mentioned, the Government of Bolivia does not find it improper to supply your Legation with the copies requested by Your Excellency, the originals of which are on file with the sole exception of that indicated by the Number 8, whose antecedents have not been made known to my Government by that of Chile, and in view of which the liquidation and payment of the credits which, like that of Messrs. Alsop & Co. previously devolved on Bolivia, are now and as a result of the arrangement of October 20th of the sole responsibility and province of the former Republic [Chile]." (App. I, Case of the United States, p. 35.)

Under date of October 31, 1906, the American Minister at La Paz forwarded to the Department copies of the so-called "secret notes" of October 21, 1904, said copies having been officially furnished him by the Bolivian Government.

On July 16, 1907, the American Minister at La Paz stated in a communication to the Secretary of State that—

"The Government of Bolivia insists that clause 5 of the Bolivian-Chilean treaty of October 20, 1904, when taken in connection with the explanatory notes of October 21, 1904, which were exchanged at Santiago between the Minister of Foreign Relations of Chile and the Bolivian Minister at Santiago, relieves Bolivia from its responsibility upon the claims specified in the treaty." (App. I, Case of the United States, p. 38.)

On December 27, 1907, the American Minister at La Paz again reported to the Secretary of State regarding a conference between himself and the Bolivian Minister for Foreign Affairs, in which the American Minister stated:

"In a report of a conference between Chilean Minister for Foreign Affairs and the Bolivian Minister to Chile, the latter states that the former claimed that the Chilean obligation is limited by the treaty, and that Chile will only pay the 568,192 pesos Chilean gold offered to the Alsop claimants, and that she would defend herself against any American diplomatic action in the premises, and for that purpose proposed that the two Governments agree to annul the protocols of October 21, 1904."

This is certainly a remarkable statement to be made by an official of the Chilean Government in that it shows, first, that the Chilean Government at that time considered the "secret notes" as placing Chile under an obligation to satisfy the Alsop Claim in its entirety; and, secondly, that the then Minister for Foreign Affairs of Chile was willing to propose, and, we must presume, to carry out, a plan scarcely to be commended.

On March 7, 1908, the Bolivian Minister for Foreign Affairs stated the position of the Government of Bolivia in the following language:

> "The consequence of the foregoing explanation is that in the present case, Bolivia has been absolved from all liability in the liquidation and payment of the credits enumerated in the aforementioned treaty of peace, by virtue of which a formal substitution has been stipulated with Chile, as your excellency will remember, at the finish of the note I now reply to, which also appears in the exchange of notes [notas reversales] of October 21, November 17 and 21, 1904.
>
> "The high contracting parties agreed upon the first data on October 21 of the year mentioned in declaring 'that the obligation Chile contracts according to article No. 5 of the said treaty, comprises that of settling in a direct manner with the two groups of creditors recognized by Bolivia, the definite cancellation of each one of the credits mentioned in said article, thus releasing Bolivia from all former responsibility.
>
> "'In consequence,' thus states the note from the Chilean Chancery, 'it is understood that Chile, substituted in all the obligations and duties that would have belonged to Bolivia in connection with those credits, will assume whatever duty or claim that might be presented to Bolivia by any of the interested parties in the credits referred to.'
>
> "Furthermore, as the sum destined by Chile for the payment of the mentioned debts was inferior to the total of the credits, it was agreed upon by the last notes 'to distribute that sum in proportion to the capital that the said credits amounted.' In view of which I regard that, existing the formal substitution of Chile relative to the responsibilities of Bolivia, it does not appear regular that the claimants insist on the continuation of Bolivia's original obligation, especially when the most excellent Government of Chile has declared to the Bolivian Representative in Santiago that it is inexact 'that it had manifested to the American creditors that they should treat with Bolivia,' declaring, on the contrary, its disposition to examine whatever claim that may be made on the matter.
>
> "In consequence, my Government considers that whatever consideration given, favorable or adverse, to the memorandum annexed to the note of your excellency, will be an improper step on its part in questions that are being treated in their proper forum before an independent Chancery, and it abstains from any expression on the subject, in the confidence that the elucidation and high spirit of honor and good will that equally animate the most excellent Governments of the United States of America

and of Chile will be conducive to an agreement entirely satisfactory to all the interests engaged in the matter.

"Whereby I renew to your excellency the assurances of my most high and distinguished consideration." (Appendix, p. 18.)

On April 16, 1910, in a note addressed to the American Chargé at La Paz, the Bolivian Minister of Foreign Relations set forth the position of the Government of Bolivia at that time upon this question as follows:

"By our official communication, No. 241 of March 30 last, I had the honor to inform that legation, that, while it in fact did not correspond to my Government to take a direct part in the Alsop & Co. claim, nevertheless our diplomatic representative in England, Dr. Ismael Montes, would receive special instruction to watch the interests and rights of Bolivia, in the judgment and arbitration submitted to His Majesty King Edward VII.

"Extending such remarks so as to avoid that they might be interpreted in disagreement with the ideas which my Government holds in that respect, I manifest to you, so that you may, if you think it convenient, notify the Department of State in Washington that Bolivia by virtue of the treaty of peace of the 20th of October, 1904, and the notes which have been added a short time later to it, is perfectly absolved from all responsibility." (Appendix, p. 21.)

On June 7, 1910, the American Chargé d'Affaires at La Paz reported that the Bolivian Under-Secretary for Foreign Affairs had furnished him the following memorandum upon the question of the binding effect of the "secret notes":

"The *notas reversales* to which the legation of the United States of North America refers, exchanged between Messrs. Gutierrez and Bello Codecidos, are not secret and have been published in the 'Memorias' of 1905. On our part we have sufficient reasons to believe that Chile will not disavow their validity, as up to the present they have strictly complied with them." (Appendix, p. 22.)

Finally, under date of September 9, the Bolivian Minister of Foreign Relations addressed to the American Chargé at La Paz a note in which the following statement is made:

"Relative to Alsop question and in answer I beg to manifest that the liquidation of this credit belongs absolutely to the Chilean Government on account of being a real obligation contracted by it and for the reason of the estaca minas bound for its canceling having passed to its dominion. To prove it only need to refer to notas reversales of October 21, 1904, exchanged between the envoy extraordinary and minister plenipotentiary from the Government of Bolivia and the minister for foreign affairs of Chile, which expressly mentioned the definite canceling of each of the credits comprised in article 5 of the treaty of October 20, 1904, entirely eliminated the responsibility of Bolivia,

> Chilean Government taking charge in all their entirety of all the debts. The Government of Bolivia understood that by virtue of this it remains completely separated from the debate." (Appendix, p. 25.)

In the face of these repeated expressions from the Bolivian Government it must be assumed that the Government of Bolivia understood prior to the signature of the treaty, upon its negotiation and conclusion, and has understood from that date until the present that the Government of Chile was assuming an unlimited liability with reference to the liquidation of these debts; that the Government of Chile knew, prior to and during the negotiations for the treaty, at the time of the signature of the treaty, at the time of the exchange of ratifications of the treaty, and has understood from that date until the present that the Government of Bolivia did so regard the obligation of Chile; and, further, that the Government of Bolivia would not have negotiated the treaty, and, indeed, would have refused to sign the same, unless and until the Government of Chile indicated that its liability under this treaty was to meet in their entirety all of the obligations named. It is therefore impossible to understand and to explain the attitude of the Government of Chile, now put forward, that these notes not only do not now have but that they never had any valid force or effect upon this matter.

Finally, it should be observed that it is not an unusual thing for foreign offices to exchange notes regarding the meaning which shall be attached to and govern a treaty, and governments would be slow in contending that such notes so exchanged did not bind them in the matter of the interpretation to be given to the treaty in question. Without going into detail upon this question, it is perhaps sufficient to cite as an illustration of this kind of an arrangement the recent notes exchanged between the representative of His Britannic Majesty's Government at Washington and the Secretary of State of the United States regarding the scope and extent of article 1 of the general treaty of arbitration entered into by the two Governments under date of June 5, 1908, in which notes it was set forth that the treaty thus negotiated should not apply to pecuniary claims.

The contentions of the Government of Chile that "the only power capable of interpreting treaties is the power that makes them" can not, of course, as has been already fully discussed apply where two governments seek by the making of treaties to curtail or affect the rights and obligations of the citizens or sub-

jects of third powers. To grant the principle contended for by the Government of Chile would be to place aliens at the complete mercy of any two powers which might be disposed to make treaties affecting their rights. Moreover, in connection with this statement and with Chile's question, "What value can those secret Notes have, and how can they alter what the parties themselves wished to express?" (Chilean Case, p. 43), it is not, perhaps, inappropriate to observe that with notes, as with treaties, one party to the transaction has no more right to fix and declare the meaning of a treaty or note than has the other, and that in this particular case the Government of Bolivia has been and is (as was pointed out above) just as insistent and specific that these notes imposed an unqualified liability upon the Government of Chile as the Government of Chile is now (for the first time) insistent that the notes are practically void and of no effect.

This whole matter is, however (as has been already stated), placed beyond the necessity for argument, when it is observed that notwithstanding the Government of Chile has thus contended that the notes are without any force or effect, still that Government in its present case invokes such notes, considers the same and gives to them a definite and precise meaning expressed in the following language:

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> "The only object, therefore, of the parties when they agreed that Chile should take upon herself the responsibility of paying these claims was to eliminate every kind of future difficulty between the two Governments. For this purpose Chile considered Bolivia free from responsibility with regard to them, and promised not to undertake ulterior action in favour of the creditors concerned." (Chilean Case, p. 40.)

The Government of the United States wishes to submit and to emphasize, as just stated, that the Government of Chile here interprets these notes in strict accordance with the interpretation for which the Government of the United States contends, viz, that the notes were intended to have, and did have, the effect of transferring to Chile the entire responsibility of paying these claims, and that Bolivia as a result of this undertaking was entirely relieved from any liability upon these claims. It is submitted that in the face of such a contention by the Government of Chile, it can not be doubted that the notes have the force and effect which has been given to them by the Government of the

United States, and that, therefore, the Government of Chile is under an obligation completely to satisfy the Alsop Claim.

This being true, the only question for determination is the amount due under the contract, and not the amount which Chile has assumed to pay, since by this interpretation of the notes Chile has assumed full responsibility in the matter, and, as has been pointed out, it is impossible for these two Governments by their own act to reduce the amount due under the Wheelwright contract.

But the Government of Chile further contends as follows:

> "But if the foregoing observations and precedents are not sufficient to invalidate in this connection these Notes by which it is claimed that one may alter the stipulations of a Treaty solemnly signed, ratified, and proclaimed, one may oppose to them other Notes exchanged between the said parties, subsequent to the confidential ones, and published before the ratification of the Treaty by the Congresses of either country." (Chilean Case, p. 42.)

The Case of the Government of Chile appears, as hereinbefore suggested, to attach some inherent merit to the simple fact of publication of the notes and to consider that while notes published are valid and binding notes unpublished are valueless and of no effect. It seems unnecessary to show that any such distinction as this is entirely fanciful and finds absolutely no support either in the rules and principles of international law or in the practice of nations. It is a matter of such common knowledge as to require indeed no mention among those at all familiar with the world's diplomatic history that some of the most far-reaching and therefore important treaties which have been made between nations have been secret treaties, the existence and terms of which were for years unknown, even though suspected, by the other nations of the world, and yet such treaties were treated as obligatory and were observed with a care just as scrupulous as that which attended the treaties which were given the widest publicity. It is inconceivable that it could be seriously contended that any distinction could be made between treaties or notes, as to their validity and binding effect, based upon the mere fact that some were secret while others were published. Indeed, the Government of Chile will recall that at least on one occasion in its history it invoked the existence of a secret treaty between two other powers and the observance of such treaty by such powers as one of the reasons and causes justifying its own declaration of war. The value for the Government of Chile of this whole question of

secrecy is, however, utterly destroyed by the fact that, as already pointed out, these notes actually were published by Bolivia soon after the conclusion of the treaty and before its ratification, and therefore if the contention has any value it is in favor of the United States, since the notes being published they become, under the evolution of the Government of Chile, legal and binding. Inasmuch, however, as these notes were published prior to the ratification of the treaty of which they form a part all talk about *secret* notes is beside the point, for, as the Government of Bolivia has said, the notes "are not secret."

Concerning the allegation made in the Case of the Government of Chile that it is contended that these notes "alter the stipulations of a Treaty solemnly signed, ratified, and proclaimed" (Chilean Case, p. 42), the following observations may be made: In the first place, the notes are advanced not as altering the stipulations of the treaty of 1904, but merely as explaining the meaning of that treaty, and in this connection it should be observed that these notes "may be taken as the basis for the interpretation" of the treaty, because the "words and conceptions of the treaty" (Chilean Case, p. 41) are, contrary to the contention of the Chilean Case, clearly ambiguous, as is shown by the language used in the note of the Bolivian Minister at Santiago to the Chilean Minister of Foreign Relations, which, as translated, is as follows:

> "The Government of Bolivia agrees with Your Excellency's Government *on the necessity of determining the purport of the wording of Article 5* of the Treaty of Peace and Friendship signed to-day by Your Excellency on behalf of the Government of Chile and by the undersigned in representation of the Government of Bolivia.
>
> "Both in regard to the claims of the Corocoro, * * * and in regard to the claims against Bolivia * * * of Alsop and Co. (assignees of Pedro Lopez Gama), * * * it has been agreed * * *" (Case of the United States, p. 278.)

This idea that the notes were for the definition of the meaning of the treaty is further and clearly set forth by the Chilean Minister of Foreign Relations in his note replying to that of the Bolivian Minister, in which the Minister of Foreign Relations said:

> "I take pleasure, in compliance with your request, *in defining the purport* which this Chancellery assigns to clause 5 of the Treaty of Peace and Friendship signed to-day by Your Excellency in representation of the Government of Bolivia and by the undersigned on behalf of the Government of Chile." (Case of the United States, p. 279.)

It would appear, moreover, from the initial statement in the note written by the Bolivian Minister, that the necessity of determining the purport of this ambiguous article was first broached by the Government of Chile.

The ambiguity under consideration in article 5 consisted in this fact: The article provides for the adjustment by the Government of Chile of two classes of claims—first, the debts "recognized by Bolivia as indemnities in favor of the mining companies of * * * and in payment of the balance of the loan raised in Chile in the year 1867," the treaty providing for "the complete cancellation" of such debts by a certain specified sum appropriated; second, the Republic of Chile "destines" the amount of 2,000,000 pesos for the "cancellation" of the debts arising from the "following Bolivian obligations." It is significant to observe that while the "complete cancellation" of the first-named debts of Bolivia is undertaken by the Government of Chile, no such cancellation is undertaken by that Government with reference to the second set of obligations. Under the second obligation therein assumed by Chile it would have been possible for the Government of Chile to do what later she offered to do, namely, offer directly to the claimants, or to the Government of Bolivia for the claimants, their pro rata of the 2,000,000 pesos set apart for this purpose and then leave the claimants to proceed against Bolivia for the balance. It is evident from the notes that, fearing that the treaty might be thus interpreted, the negotiators thereof, in order to make clear that such an interpretation would not express the true intent and meaning of the treaty as understood by those negotiating the same, and the Government of Bolivia doubtless fearing that some interpretation limiting the liability of the Government of Chile might be invoked, the two negotiators of the treaty exchanged the notes in their official capacity clearly setting forth that not only should there be a complete cancellation of the first but that there should also be a "complete cancellation" of the second series of obligations named. In the face of this wording of the treaties and in the face of the statements of the two negotiators that it was necessary to define the purport of article 5 of this treaty, it seems idle to contend that there is no ambiguity in the treaty to which these notes might attach and for which they might offer and afford the fair and intended interpretation. This argument is abundantly supported by the various expressions of the Bolivian Government regarding the meaning and intent of the parties to this negotiation, as already set forth above.

Nor was this the only article which one or the other of the respective Governments thereafter considered as involving an ambiguity which it was necessary should be cleared up in order that no misunderstanding might thereafter arise concerning the scope and meaning of the same. Thus, on November 15, 1904, a supplementary protocol was signed by the representatives of the two Governments defining the meaning of article 11 of the treaty of October 20, 1904, the representative of Chile stating that he "considered it expedient to have it clearly understood that the Government of Bolivia recognizes the absolute and perpetual sovereignty of Chile in these last-named territories," thus admitting that there was a possibility that the article in question might not be properly understood. This same protocol defined further the meaning of article 5, the Chilean representative stating that he "deemed it advisable to have it on record that this was the scope and meaning which the article referred to had." (App. I, Case of the United States, p. 446.) Apprehensive that this protocol might not make it entirely clear just what was meant by the parties to the treaty, the representatives of the two Governments exchanged further notes on November 16 and 17, going further into detail upon these various matters, and, finally, as late as December 24, 1904, the matter of the meaning of article 11 of the treaty of October 20 was the subject of a conference between the Minister of Bolivia at Santiago and the Chilean Minister of Foreign Relations, at which conference the Minister of Foreign Relations of Chile pointed out that "during the discussion of the treaty of peace and amity on the 20th of October, last, which took place in the senate chamber one of the senators pointed out the desirability of determining exactly the scope which might be given to the final paragraph of article 11 of said treaty." (App. I, Case of the United States, pp. 449–450.) Instead of the treaty being free of ambiguity, as claimed by the Government of Chile in its Case, it seems that it took the negotiators themselves two months to agree with each other as to just what scope and significance should be attached to its terms.

As regards the antecedent discussions with reference to the treaty of 1904, as likewise to the treaty of 1895, referred to in the Case of Chile (p. 44), it is only necessary to say that they appear, in the first place, so far as quoted, either irrelevant to the matters at issue or to have received a satisfactory answer in connection with the discussions above set forth. Moreover, it should be observed

that the Case of the Government of Chile has not offered the texts, either partial or complete, of these antecedent discussions, and inasmuch as the Government of the United States has therefore not had access to such antecedent negotiations referred to, nor has His Majesty, the Government of the United States submits that the conclusions drawn by the Government of Chile from the course of this correspondence must be considered as having no effect in this case.

The next statement made in the Case of the Government of Chile is not without importance and significance. It reads:

> "Still, as appears from the Protocol of the 15th November, 1904, it remained clear that 'Chile would have full liberty to study, qualify, and liquidate the said claims.'" (Chilean Case, p. 45.)

It will be recalled by His Majesty that the right to examine into the origin of these various claims was also retained by the Government of Chile in the treaty of 1895, which, as already stated, was approved by the Chilean Congress and proclaimed by the Chilean President (Case of the United States, pp. 273–274), and that in the supplementary protocol dated May 28, 1895, it was stipulated that the claim of Pedro Lopez Gama, with others named, "shall be examined by the Govt. of Chile, which Govt. in order to fix the definite amount due and to agree as to the form of payment thereof, will take into account the origin of each credit, and also the antecedents of the same consigned by the Minister of Bolivia in Chile in his memorandum of the 23rd of the present month (May 23rd, 1895)." (Case of the United States, p. 275.) The memorandum to which reference is made in this protocol set forth that the Pedro Lopez Gama claim "recognized in favor of Messrs. Alsop & Co." amounted, without reckoning interest, to 835,000 bolivianos. (Case of the United States, p. 275.) In the earlier treaty, the Matta-Reyes protocol of 1891, payment of these various claims was undertaken by the congressional party then conducting a civil war against the party headed by the Chief Executive of the Government of Chile and without any limitation whatever and without any reservation as to the right of examination. This may perhaps have been due to the fact that the congressional party was not at that time in a position to dispute the continuous and uniform contentions of the Government of Bolivia that the Government of Chile, having taken over the Littoral and having appropriated the customs receipts which had been set apart for the payment of these

claims, and in particular the claim of Alsop & Co., was, under all principles of law and equity, under obligation to afford a "complete cancellation" of these various claims.

However, the significant thing to which it is desired now to direct attention is the fact that more than fifteen years ago the Government of Chile undertook, or at least secured for herself the right to undertake, the investigation of the Alsop and other claims in order to determine the exact amounts which should be paid the claimants for their claims against the Government of Bolivia. In this connection it should be borne in mind, as will fully appear from the letter of Señor Konig, Minister of Chile at La Paz, already quoted, that from the time of the taking of the Littoral until the time of its ultimate cession, in 1904, the Government of Chile had a steadfast purpose to absorb that territory, apparently intending in payment therefor to assume the obligations of the various claimants mentioned in article 5 of the treaty of 1904. It would be a violent assumption indeed to assume that the Government of Chile, which appreciated so carefully the value of the Littoral, intrinsically as well as otherwise, did not also study with equal care the price which she was to pay therefor. It must therefore be assumed that for at least fifteen years the claim of Alsop & Co. has been under its scrutiny. This conclusion would seem to be the sounder when it will be recalled that during these fifteen years the Government of the United States has been constantly presenting this claim to the Government of Chile and requesting that that Government meet it, principal and interest, in accordance with the equities of the claimants, and that during this time the Government of Chile has been promising over and over again to settle the claim without expressing any limitation whatsoever. It can scarcely be presumed that the Government of Chile would thus repeatedly and unreservedly assume an obligation of which it knew nothing. And yet the Government of the United States wishes again to remind His Majesty that, after all these years, during which it must have given some study to the case, the Government of Chile does not now present one statement of fact and does not propose one argument of law which has any relation to or in any wise, even the slightest, affects the merits of the claim of Alsop & Co. Moreover, it will be recalled, as was fully set forth in the Case of the United States (p. 40 et seq. and p. 349), that in 1908 and 1909 the Government of the United States requested that the Government of Chile, if it had any evidence going to show

that the full amount called for by the Wheelwright contract was not equitably due, should furnish to the Government of the United States the evidence upon which it relied to support its position, because this Government had always been and was desirous that its representations in this case should be in accordance not only with its legal rights but with the strictest and most absolute equity of the situation. After considerable delay the Government of Chile, upon being pressed for a reply, admitted that it had no evidence going to the merits of the claim and sought to justify its offers of a modicum of the amount due on the contract by invoking the stipulations of the treaty of 1904.

In the face of these facts, as well as in the face of the fact that even now, as was just pointed out, the Government of Chile does not offer one shred of evidence going to show that the full amount called for by this contract, principal and interest, is not due to the claimants in this case, it would appear that any reference to the right of Chile to "study, qualify, and liquidate the said claims" is scarcely worthy of serious consideration.

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> "Next, the attention of the Arbitrator is called to another and more important question.
>
> "Alsop & Co. received from Bolivia considerable sums on account of her claims. Have they ever rendered an account of them?
>
> "As is known, Alsop & Co. received from Bolivia the right of working a number of mining properties in one of the richest silver mining regions in the world, then at its most prosperous stage, and it would be strange if, whilst all the mines of the district enriched their owners, only those which Alsop & Co. held and chose to their liking have produced nothing." (Chilean Case, pp. 48–49.)

The amounts which were received by the concessionaries as the result of their operation of the littoral mines up to June 30, 1892, were set forth in detail in the documents presented before the American-Chilean Claims Commission of that year (App. II, Case of the United States, pp. 340, 380), while the amount received up to the expiration of the leasehold term is summarized on page 346 of the Case of the United States and given in detail on page 490 of Appendix I to the Case of the United States. These accounts are therefore fully before His Majesty for his consideration and adjudication.

> "It can be proved by numerous trustworthy witnesses that Wheelwright worked these mines for many years, either personally or by means of companies with which he had shared his rights.
>
> "There exists grounds for supposing that Alsop & Co., or, rather, their liquidator, Wheelwright, never accounted for his working of the mines, either to the Government of Bolivia nor even to its representatives, the then partners of Alsop & Co. And if he has given any account of it, should Chile not have a right to inspect it?" (Chilean Case, p. 49.)

As will be seen from the documents printed on page 72 of the Appendix to the Counter Case of the United States, Wheelwright presented semiannual statements of account to the Government of Bolivia from the time he began his operations in the Littoral until that region passed into the possession and under the control

of the Government of Chile. The accounts of the working of the mines from that time until the expiration of the leasehold term have been set forth in the statements above referred to. (Case of the United States, p. 346; App. I, p. 490; App. II, pp. 336, 380.)

Regarding the inquiry "Should Chile not have a right to inspect it?" the Government of the United States respectfully refers to its instruction to its Chargé d'Affaires at Santiago under date of August 19, 1910, to the following effect:

> "The Government of the United States has at the Department of State in Washington the original books of account of Alsop & Co., from 1876 to the present time. It is from these books that Alsop & Co.'s accounts (for and against Chile) submitted in the Case of the United States have been compiled. The Government of the United States is glad to extend to the Government of Chile an invitation fully and completely to examine these books at the Department of State should the Government of Chile so desire." (Appendix, p. 26.)

This tender was made to the Government of Chile through a note addressed by the American Chargé d'Affaires to the Minister of Foreign Relations under date of August 20, 1910, which reads as follows:

> "* * * I am directed by my Government to state to your excellency that the Government of the United States has at the Department of State in Washington the original books of account of Alsop & Co.
>
> "It is from these books that Alsop & Co.'s accounts (for and against Chile) submitted in the Case of the United States have been compiled. The Government of the United States is glad to extend to the Government of Chile an invitation fully and completely to examine these books at the Department of State, should the Government of Chile so desire.
>
> "I trust that if your excellency desires to cause these books to be examined, you will not hesitate to take advantage of this invitation, extended in a spirit of such friendliness on the part of the Government of the United States." (See Appendix to Counter Case, p. 27.)

Under date of August 29 the Minister of Foreign Relations for Chile merely acknowledged the receipt of this note, this acknowledgment being received by the American Chargé on September 13.

It will thus appear that the Government of the United States is prepared to meet the requirements suggested by the Government of Chile when it says that—

> "There is, therefore, assuredly a right to make these inquiries of the United States Government, who, undoubtedly, on lending Alsop & Co. their powerful patronage, must have the necessary

means of satisfying this natural requirement on the part of those whom it judges debtors of a claim so old and so slightly recorded." (Chilean Case, p. 49.)

The Case of the Government of Chile contains also the following statement:

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"But there is a further point: there exists in the Chilean archives the report of a case brought by the said Lopez Gama against John Wheelwright, in which he asked the latter for an account of the working of these mines, on the ground that a promise had been made on behalf of Alsop & Co. to give a fourth part of what they might receive from the claims which he had ceded to them. In the lawsuit which was initiated by Lopez Gama on the 8th July, 1880, Wheelwright succeeded, by means of technicalities, in avoiding a categorical reply and only answered the plaint on the 2nd November, 1883, when Lopez Gama was dead, thus maintaining the uncertainty that has always prevailed in the relations between Lopez Gama and the Claimants.

"From this same report it is clear that Wheelwright denied to Hoppins, his co-partner and liquidator of Alsop & Co., the power under which he had granted to Lopez Gama part of the rights that he had received from him, although Hoppins had judicially recognized the document by which he made the cession." (Chilean Case, pp. 49–50.)

The technicality to which reference is made by the Government of Chile in connection with this suit between Gama and Wheelwright was that Hoppin, who signed the alleged contract providing for the payment to Gama of a certain percentage of the proceeds collected upon this claim, had no authority to make any such instrument, and the court so held. Some difficulty is experienced in considering as a technicality a defect which goes to the very life of the instrument under which a party claims. The decision in this case is printed at page 119 of the Appendix to this Counter Case.

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"It has already been pointed out that there is no foundation for the doctrine that a successor State is under an imperative and universal duty to take over, in whole or in part, the obligations of its predecessor. Some of the conditions which have to be fulfilled before this duty arises have already been indicated, and it has been shown that they are not fulfilled by the present claim. Other elements vitiating the claim, either in whole or in part, remain to be dealt with.

> "In the first place, it is natural to ask who are now the representatives of the claim of Alsop & Co., among whom will be divided the amount to be paid.
>
> "As is clear from the document that created Alsop & Co., they had ten partners. Some of them having ceased to exist without leaving heirs, what will be the destination of the share due to them?
>
> "Is there any winding up of the Society or any document by which one can ascertain the persons who at the present time have the power of distributing the firm's capital and the manner in which that should be done?
>
> "Will the share of those who died without heirs accrue to the estate of the surviving partners, or to their heirs?
>
> "As already stated, it is understood that the Government of the United States being now the claimants in the name of Alsop & Co., it would be the party called upon to decide in what form and among whom any receipts are to be shared; but no one will deny the right of Chile to know to whom and in what proportion is to be given what Chile has to hand over." (Chilean Case, p. 48.)

Referring, first, to the query raised by the Government of Chile in the statement that some of the partners of Alsop & Co., "having ceased to exist without leaving heirs, what will be the destination of the share due to them?" it should be observed that it is evident that the learned counsel of the Government of Chile have not fully investigated the matter as to whether or not any or all of the deceased partners left heirs, as otherwise such a statement could not have been made. The Government of the United States undertook an investigation of this matter prior to the negotiation of the protocol of December 1, 1909, and found that each of the partners in question, who had died, had left representing them, heirs, assignees, or devisees, who will be entitled to receive their pro rata shares in the distribution of whatever award is made by His Majesty.

The Case of the Government of Chile also assumes that "no one will deny the right of Chile to know to whom and in what proportion is to be given what Chile has to hand over." This is, indeed, a novel doctrine to be advanced by one government as against another government in a diplomatic claim directed against the one by the other, and it must be that the learned counsel for Chile in preparing the Chilean Case overlooked the fundamental principles upon which the doctrine of diplomatic intervention is based. It should be unnecessary to treat this point in any extended manner, since it is fundamental in the law of nations that where one nation intervenes diplomatically with another nation concerning

the wrongs or injuries inflicted on citizens of the first by the second, the first nation by such intervention makes the cause of its citizens its own cause and the claim thereafter assumes an entirely different status from that which it had while the injured citizens were still presenting their claim personally to the injuring state and becomes, after such diplomatic intervention, a purely national matter between sovereign states. This principle is based upon the other principle that where one nation injures the citizens of another nation, such nation thereby *pro hac vice* injures the state to which such citizens belong, and, the state being injured, it applies to the other state for a redress of its injury. As Vattel puts it:

> "§ 71. Whoever offends the state, injures its rights, disturbs its tranquillity, or does it a prejudice in any manner whatsoever, declares himself its enemy, and exposes himself to be justly punished for it. Whoever uses a citizen ill, indirectly offends the state, which is bound to protect this citizen; and the sovereign of the latter should avenge his wrongs, punish the aggressor, and, if possible, oblige him to make full reparation; since otherwise the citizen would not obtain the great end of the civil association, which is, safety.
>
> "§ 74. But, if a nation or its chief approves and ratifies the act of the individual, it then becomes a public concern; and the injured party is to consider the nation as the real author of the injury, of which the citizen was perhaps only the instrument." (Vattel, Book II, chap. 6, secs. 71 and 74.)

Thus, an injury to a citizen is an injury to a state, and the citizen's state being injured by the injury to its citizen the entire matter becomes clearly a question between two sovereign states. It is unnecessary in this view of the situation to do more than state the principle that under such doctrines as those set forth, whatever indemnity is paid is paid by the injuring state to the injured state for the injury done by the one to the other, and the injuring state has and can have no concern whatever as to the final disposition which may be made of the fund which the injuring state has paid to the injured state for the wrong suffered by the latter.

How thoroughly settled this principle is in international law and how consistently and how constantly both the Government of Great Britain and the Government of the United States have adhered to the same will appear from the following statements made by the executive and judicial branches of both Governments.

Upon the question of the national character of the intervention which a state makes in behalf of its citizens, the Government of the United States desires to call attention to the circular instruc-

tion addressed in 1848 by Viscount Palmerston, Secretary of State for Foreign Affairs, to the British representatives in foreign states, as that document is set forth by Sir Robert Phillimore in his Commentaries on International Law:

"FOREIGN OFFICE, *January 1848.*

"Her Majesty's Government had frequently had occasion to instruct her Majesty's representatives in various foreign States to make earnest and friendly, but not authoritative representations, in support of the unsatisfied claims of British subjects who are holders of public bonds and money securities of those States.

"As some misconception appears to exist in some of those States with regard to the just right of her Majesty's Government to interfere authoritatively, if it should think fit to do so, in support of those claims, I have to inform you, as the representative of her Majesty in one of the States against which British subjects have such claims, that it is for the British Government entirely a question of discretion, and by no means a question of International Right, whether they should or should not make this matter the subject of diplomatic negotiation. If the question is to be considered simply in its bearing upon International Right, there can be no doubt whatever of the perfect right which the Government of every country possesses to take up, as a matter of diplomatic negotiation, any well-founded complaint which any of its subjects may prefer against the Government of another country, or any wrong which from such foreign Government those subjects may have sustained; and if the Government of one country is entitled to demand redress for any one individual among its subjects who may have a just but unsatisfied pecuniary claim upon the Government of another country, the right so to require redress can not be diminished merely because the extent of the wrong is increased, and because instead of there being one individual claiming a comparatively small sum, there are a great number of individuals to whom a very large amount is due.

"It is therefore simply a question of discretion with the British Government whether this matter should or should not be taken up by diplomatic negotiation, and the decision of that question of discretion turns entirely upon British and domestic considerations.

"It has hitherto been thought by the successive Governments of Great Britain undesirable that British subjects should invest their capital in loans to foreign Governments instead of employing it in profitable undertakings at home; and with a view to discourage hazardous loans to foreign Governments, who may be either unable or unwilling to pay the stipulated interest thereupon, the British Government has hitherto thought it the best policy to abstain from taking up as International Questions the complaints made by British subjects against foreign Governments which have failed to make good their engagements in regard to such pecuniary transactions.

"For the British Government has considered that the losses of imprudent men, who have placed mistaken confidence in the good faith of foreign Governments, would prove a salutary warning to others, and would prevent any other foreign loans from being raised in Great Britain, except by Governments of known good faith and of ascertained solvency. But nevertheless, it might happen that the loss occasioned to British subjects by the non-payment of interest upon loans made by them to foreign Governments might become so great that it would be too high a price for the nation to pay for such a warning as to the future, and in such a state of things it might become the duty of the British Government to make these matters the subject of diplomatic negotiation.

"In any conversation which you may hereafter hold with the ——— ministers upon this subject, you will not fail to communicate to them the views which her Majesty's Government entertain thereupon, as set forth in this despatch.

"I am, &c., "PALMERSTON."

(Phillimore's International Law, Vol. II, 3d ed., pp. 9–11.)

The self-same principle as that announced in this instruction has also guided the Government of the United States in its dealings with third powers regarding the question of its right and duty to intervene as against other powers in behalf of American citizens suffering wrongs and injuries at the hands of such powers. In a note addressed to the Venezuelan Minister by Secretary Frelinghuysen on April 4, 1884, this doctrine is set forth as follows:

"A foreigner's right to ask and receive the protection of his Government does not depend upon the local law, but upon the law of his own country. His citizenship goes with him into whatever country he may visit, and the duty of his Government to protect him so long as he does nothing to forfeit his citizenship accompanies him everywhere. This duty his Government must discharge, and it could not, if it would, be relieved therefrom by the fact that the municipal law of the country where its citizen may happen to be has seen fit to provide under what circumstances he may be permitted to appear before the authorities of that country. Such a law can not control the action or duty of his Government, for Governments are bound among themselves only by treaties or by the recognized law of nations, and there is nothing in the existing treaties between the two countries or in the law of nations which recognizes as pertaining to Venezuela the right by the enactment of a municipal law to say how, or where, or under what circumstances the Government of the United States may or may not ask justice in behalf of one of its own citizens." (Wharton's International Law Digest, 2d ed., Vol. II, p. 697.)

And see, for American judicial expressions on the same subject, *The United States* v. *Diekelman* (1875), 92 U. S., 520, 524; *Frelinghuysen* v. *Key* (1883), 110 U. S., 763, 771.

Regarding the disposition of the fund received as a result of this national act of intervention, the law is no less clear and settled. The question has arisen before the courts of both Great Britain and the United States and has received substantially the same adjudication in the tribunals of both countries—an adjudication which carries to its logical conclusion the principles above announced regarding the nature of the act of intervention. The question arose in Great Britain in the case of *Rustomjee* v. *The Queen* (L. R. 1875–76, Vol. I, Q. B. D., 487). In that case the Emperor of China had by treaty agreed to pay to the British Government the sum of $3,000,000 on account of debts due to British subjects from certain Chinese merchants. The money having been received by the British Government, one of the British merchants filed a petition of right to obtain payment from the fund paid by China of a sum of money alleged to be due him from one of the Chinese merchants. In holding that the petition of right would not under the circumstances lie, Cockburn, C. J., expressed himself as follows:

> "Now the effect of such a treaty is, in my opinion, simply this, that it places the fund at the disposition of her Majesty, for her Majesty at her discretion to cause such distribution of it to be made as shall make good the claims which her subjects have against the foreigner from whose government the money is received. In such a case a petition of right will not lie. The notion that the Queen of this country, in receiving a sum of money in order to do justice to some of her subjects, to whom injustice would otherwise be done, becomes the agent of those subjects, seems to me really too wild a notion to require a single word of observation beyond that of emphatically condemning it. In like manner, to say, that the sovereign becomes the trustee for subjects on whose behalf money has been received by the Crown, appears to be equally untenable. It comes simply to this, that her Majesty, in order to enable her to see that injustice is not done to her subjects, stipulates for the payment into her hands of a sum of money. The distribution of that must be left to her Majesty's discretion; no petition of right has ever been held to be applicable to such a case. To my mind, it is utterly inconsistent with all the constitutional theories of the prerogative of the Crown, to suppose that her Majesty can be coerced by a petition of right into doing that justice which, I am quite sure, it will require no petition of right to obtain, if the facts and the merits of the case were such as to induce the government to believe that the claim was a just one. At all events, I think the petition of right will not lie, and that that is perfectly clear upon all the principles which have ever been applied to petitions of right and all the precedents which have hitherto existed in courts of law." (L. R. 1875–76, I, Q. B. D., 492.)

Blackburn, J., commented upon the same point as follows:

"The argument of Mr. Thesiger went so far as this, that her Majesty, in making that treaty and securing that money, was to be considered as an agent for each one of those British subjects individually. I certainly am not aware of any authority whatever in the English law that has ever put the sovereign in such a position when exercising an act as the body politic,—to use the old phrase, 'the sovereign in the capacity of the body politic, exercising an act of prerogative.' To say that the Queen was the agent of any person seems to me to be utterly unfounded upon any authority whatever. There are plenty of old cases upon which the dignity of the Crown is exaggerated beyond measure. This has been carried to such an extent, that I should certainly pause or hesitate whether I would follow it at the present day to the full extent; but to bring down her Majesty to the situation of it being said of her, that in making a treaty of peace with the Emperor of China she was an agent for everybody who had a claim against the Emperor of China, is totally without authority. And I believe, that if one or two hundred years ago any counsel had argued in that way, we should have been asked to record his words in order that he might be sent to the Tower, a course which is not pursued now-a-days. The position, however, is quite untenable. Then, when her Majesty has actually received the money, it is a little more plausible, a little, but not very much more plausible, to say that, though the treaty was made in the exercise of her prerogative, yet when her Majesty did receive the money it ought to be given to those persons who have claims." (L. R. 1875–76, I, Q. B. D., p. 493.)

"The suppliant puts it here that he is entitled as of right that her Majesty should pay him the money. I, however, do not know whether one would stand upon that, because, after all, it might be intended by the petition to say that the claim of right was that her Majesty should order and direct an investigation to be made. That brings us to consider whether or not this is a matter upon which a petition of right would lie. It is quite impossible to say that her Majesty is in any sort of position of having received the money to the use of this person; and to say that there has been privity of contract between this person and the Queen, either an express or implied contract, so as to make her the agent to hold the money for him, as if she had been a subject. According to *Williams* v. *Everett* (1) it seems to be out of the question. There is nothing in the least approaching to such a contract. The more plausible analogy would be to say that her Majesty stood in the position of a trustee for creditors who had received the money from the insolvent debtor, or from the debtor, who for that matter, may not be insolvent, but going away. Having received the money on trust to divide it amongst the creditors, a Court of Equity would cause an investigation to be made in order to discover who is entitled, and direct the money to be held for them. That would be the more plausible way of putting it; but, as I have already said, that is not the form of relief asked for here. But even if the petition had been shaped in that way it would have been untenable, for this reason: that the Queen in making a treaty and receiving money

under it, and exercising a high act of prerogative, is not at all acting as a trustee. If it were a trust, there are plenty of old authorities to which I might refer; certainly some of those referred to in Plowden's Commentaries, p. 238, in which it has been held that the sovereign in his body politic capacity could be seised to a use." (L. R. 1875–76, I, Q. B. D., 494, 495.)

Lush, J., commented with equal clearness upon the erroneous position assumed by the claimant in this case. In the course of his opinion he said:

"Now, taking it, as it appears to be, as a demand of a debt due from the Crown for money had and received, it is necessary to assume, in order to reach that conclusion, that the Queen, when this money was received, received it as agent of the suppliant, that is, under his authority, or claiming to have his authority to receive it for his use. Now, I must say that proposition startles one. It is not only derogatory to the sovereign's dignity, but I think it is repugnant to every constitutional principle. A treaty is an act of prerogative. In making, and negotiating, and perfecting that treaty the Crown acts of its own inherent authority, not by the authority, actual or supposed, of any subject; and I think all that is done under that treaty is as much beyond the domain of municipal law as the negotiation of the treaty itself; and when this money was received, it was received by the sovereign in her sovereign character, not at all, in any view of it, actual or constructive, as the agent of any subject whatever.

"It seems to me that the relation which is pressed upon us here never existed in this case between the Crown and the subject, and is one which can not exist in any state like ours between the sovereign and the subject. No doubt a duty arose as soon as the money was received to distribute that money amongst the persons towards whose losses it was paid by the Emperor of China; but then the distribution when made would be, not the act of an agent accounting to a principal, but the act of the sovereign in dispensing justice to her subjects. For any omission of that duty the sovereign can not be held responsible. The responsibility would rest with the advisers of the Crown, and they are responsible to Parliament, and to Parliament alone. In no view whatever can an individual subject have any such claim as the suppliant pretends to have by this petition, namely, a claim to coerce the sovereign by judicial proceedings into the payment over of a part of the indemnity received in her sovereign character from the Emperor of China." (L. R. 1875–76, I, Q. B. D., 497.)

The courts of the United States have acted upon the same principle in dealing with the question of the distribution of the sum awarded by an international tribunal of arbitration at Geneva. Mr. Justice Lamar, of the Supreme Court of the United States, laid down this principle, as follows:

"It was held in *United States* v. *Weld* (127 U. S., 51) that this award was made to the United States as a nation. The fund

was, at all events, a national fund to be distributed by Congress as it saw fit. True, as citizens of the United States had suffered in person and property by reason of the acts of the Confederate cruisers, and as justice demanded that such losses should be made good by the government of Great Britain, the most natural disposition of the fund that could be made by Congress was in the payment of such losses. But no individual claimant had, as a matter of strict legal or equitable right, any lien upon the fund awarded, nor was Congress under any legal or equitable obligation to pay any claim out of the proceeds of that fund.

"We premise this much to show that, as respects the various claims, both of the first and second classes, for which payment was afterwards provided by Congress, they stood on a basis of equality, in the matter of legal right on the part of the claimants to demand their payment, or legal obligation on the part of the government of the United States to pay them. There was, undoubtedly, a moral obligation on the United States to bestow the fund received upon the individuals who had suffered losses at the hands of the Confederate cruisers; and in this sense all the claims of whatsoever nature were possessed of greater or less pecuniary value. There was at least a possibility of their payment by Congress—an expectancy of interest in the fund, that is, a possibility coupled with an interest." (*Williams* v. *Heard* (1890), 140 U. S., pp. 537–538.)

In view of the principles of international law thus announced and acted upon by the nations of the world, as set forth by the leading jurists and as interpreted by the diplomatists and the courts of the great nations, namely, that diplomatic intervention is a national act, taken by one nation against another for injuries suffered by the one at the hands of the other (either immediately and directly or because of injuries to the citizens of the one), and that the fund received by the one from the other is a national fund in which the parties injured, no matter who they may be, have not an enforceable right or interest, such fund being and constituting a fund which may be expended or distributed as the sovereign directs, it can be with certainty asserted that the question of the disposition of the fund which shall be paid by the Government of Chile to the Government of the United States by reason of the award of His Majesty is a question in which the Government of Chile can have no interest whatever, since the Government of Chile is paying the sum, not to the claimants, but to the Government of the United States, and when it is so received the fund is, not only under the law of nations but under the municipal law of the United States as well, "a national fund" to be distributed as the proper authorities of the American Government shall determine.

The Chilean Case continues:

> "There are, in Chile itself, many who say they are heirs of some of the partners of Alsop & Co., and others regard themselves as creditors. There are also judicial notifications presented to the Chilean Government by the Courts of Chile and by those of Peru, in which the retention of the sums appointed by Chile for the payment of these claims is requested." (Chilean Case, p. 48.)

The Government of the United States is not advised of the existence in Chile of any heirs of any of the partners of this firm. If any such heirs exist they may, upon the making of the award, present their claims before the proper American tribunals, which will give to them a full, fair, and impartial hearing, and pronounce a judgment in accordance with the principles of law and equity which may be found to exist. These remarks apply likewise to the creditors, though the Government of the United States has reason to believe that an amicable adjustment has been made between the company and the Chilean citizens who are creditors thereof and that the rights of such creditors have been by this arrangement fully and satisfactorily protected.

Concerning the "judicial notifications" presented to the Chilean Government by the courts of Chile, and by those of Peru, in which the retention of the sums appointed by Chile for the payment of these claimants is requested, it need only be said that in view of the principles already thoroughly discussed the claim is now a claim prosecuted by the Government of the United States against the Government of Chile, and therefore it is impossible for the jurisdiction of the courts of Chile to attach to such funds when awarded to the United States, and the matter of the "notifications" regarding liens or claims upon such funds is therefore not one in which the Government of the United States or His Majesty can have any concern. Here, again, it may be observed that the proper American tribunals will be open for the consideration in a proper way of all claims which may be made against those to whom this award may be finally distributed.

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> "Again, Alsop & Co. should explain their dealings with the Arica Customs, and account for any sums received by them in respect of these Customs. They should explain what applications they made to Bolivia, both before and after the Pact of Indefinite Truce of 1884, in order to get the sums due to them from Bolivia under their agreement. It is plain beyond question that Bolivia remained the Company's debtor for the whole time between 1876 and

> 1904, even if her liability be held to have ceased in the latter year. Under no circumstances can Chile be held responsible for any delay in meeting the claim during that period, or for any claim arising out of that delay. Reference is especially made to the percentage of the produce of the Arica Customs which remained the property of Bolivia in pursuance of the truce last mentioned. Why did not Alsop & Co. during the 20 years after the truce recoup themselves from that source? It is for them to explain their own neglect in these matters and not to seek to effect Chile with the responsibility." (Chilean Case, p. 50.)

Replying to the points raised by this paragraph in their order, it should be observed, first, that Alsop & Co. have never received one cent upon their account from the Arica customs receipts, nor does it appear that it ever made any application to the Government of Bolivia for such custom receipts, for the reasons already given above.

It is true, in the next place, that Bolivia remained the company's debtor not only, as Chile remarks, for "the whole time between 1876 and 1904," but that Government continues and will continue to remain the company's debtor upon the contract debt until that debt is paid; but this, as has already been explained, has no effect whatsoever upon Chile's liability to pay the contract debt, which arises, first, because of her tortious appropriation of the Arica customs receipts, and, second, because of her unlimited assumption of liability under her treaties with Bolivia, and, third, because of her repeated diplomatic undertakings to the United States.

Inasmuch as the Government of Chile either has since 1882 had in its treasury or has used the proceeds of the Arica customs which had been appropriated under the Wheelwright contract to the payment of the debt recognized by that contract, the Government of Chile is wholly and entirely responsible for the delay in payment, as well as "for any claim arising out of that delay."

It has already been shown before that the Government of Chile exacted from the Government of Bolivia that the latter yield to the former 65 per cent of the custom-house receipts at Arica, and that the balance, 35 per cent, which remained to Bolivia rarely exceeded by more than a very few thousand pesos the amount to which Bolivia was entitled under the Wheelwright contract. The reasons why neither the Government of the United States nor the claimants ever applied for this small excess has been fully set forth on page 138, *supra*.

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"It must also be noted that the sum destined by Chile to cancel the Alsop claims exhibits no such discrepancy from its actual value (even setting aside the considerations set forth to show how doubtful is its moral value) that they should decline to receive it as a definitive cancellation.

"In fact, the claim recognized by Bolivia, supposing that Wheelwright received nothing from the mines whose working was given them as part payment, amounts to 835,000 Bolivian 'pesos' (835,000 bs.).

"In various liquidations made by the Government of the United States there figures also, as part of this claim, an amount of 240,700 Bolivian 'pesos' for interest accrued to the date of the contract of Wheelwright with the Government of Bolivia. But this sum must not be taken into account, since it is clear from Clause 4 of the transaction of the 24th December, 1876, it was expressly agreed that the parties thereto appointed for the payment of this interest part of the product of certain mines individually determined, and agreed that the sum should be considered as cancelled with the Concession that was made for its payment whether the mines produced anything or no.

"This sum being eliminated, there remains only the capital of 835,000 'pesos', which, reduced to Bolivian currency as stipulated in the contract (reckoning 19*d.* for each Bolivian peso, its average value, from the time Chile signed the treaty until to-day), would amount to the sum of £66,104.

"The sum reserved by Chile amounts to £49,158, which, as one sees, is equivalent to 74 per cent. of the capital of the claim.

"It is admitted that Bolivia recognised also in the original contract 5 per cent. annual non-accumulative interest; but this interest must be regarded as covered by the incomings of the workings of the mines of which Alsop & Co. have never rendered an account." (Chilean Case, pp. 50 and 51.)

It is not entirely clear just what argument or contention the Government of Chile desires to set forth in these paragraphs. It would appear, however, that the fundamental thought running through them is that inasmuch as the claim is an old claim, therefore the claimants should be grateful to receive any part of it in liquidation of the entire amount. In view of the fact that the age of this claim is, as has already been stated, owing wholly and entirely to the long delay which, contrary to the wishes of the claimants and against the repeated and insistent representations of the United States, the Government of Chile has repeatedly interposed to the payment of this claim, the Government of the United States submits that it is not for the Government of Chile to contend that the age of this claim lessens its equity.

On the contrary, inasmuch as (as has just been stated, and as has been abundantly proved) the delay in this case has been entirely because of the unwillingness of the Government of Chile to give to the claimants that to which, under all the controlling principles of international law and of equity, they were entitled, the Government of Chile is not now after all these years in a position to suggest that 74 per cent of the capital of the claim is an equitable settlement. It must, under such circumstances, be considered that the Government of Chile should pay upon this debt the last penny to which the claimants are entitled under their contract, which, indeed, is the liability under which that Government now rests.

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> "But even calculating this interest, the amount that Chile has offered is not less, in view of the circumstances, than the owners might have expected from a claim so old and so nebulous in its origin.
>
> "All the other creditors, including the Chileans whose goods were confiscated, gladly accepted the amount due to them *pro rata*, and the representatives of Alsop & Co. themselves have offered on other occasions to accept the cancellation of this claim with sums immensely inferior to what they now claim." (Chilean Case, p. 51.)

It is unnecessary to observe that the mere fact that other claimants, who had perhaps less meritorious claims, or who were less insistent upon their rights, or less able to press them upon the attention of Chile, or were without the means of invoking diplomatic protection, have seen fit to accept in settlement of their claims sums constituting but a small percentage of the amounts which in first instance they claimed as due, can have no force or effect whatsoever upon the validity, the legality, or the equity of the claim of Alsop & Co.

CONCLUSION.

It is submitted that the Government of the United States has now fully and completely answered every serious allegation and contention of the Government of Chile, whether such allegation or contention has been deemed by the Government of the United States to be relevant or irrelevant, material or immaterial, and the Government of the United States has done this, notwithstanding it has involved, as was foreshadowed in the introductory statement to this Counter Case, some considerable repetition of argument and some illogicality of arrangement.

In the course of this discussion, the Government of the United States has established, as it believes, that this claim was in its origin, both as to Gama and as to Wheelwright, legal, valid, and equitable in all its parts, and that any allegations and insinuations to the contrary are without any foundation whatsoever in law or in fact.

The Government of the United States submits that it has also shown that under the principles of international law, under the decision (invoked by the Government of Chile) of the United States and Chilean Claims Commission of 1901 (which dismissed the claim for want of jurisdiction), and under the well-recognized precedents of international usage, it is acting clearly within its international rights in intervening in behalf of the American partners who composed the firm of Alsop & Co., and whose money exclusively went into this enterprise.

It has also been demonstrated, upon the point of the exhaustion of legal remedies, that so far as the purely tort side of this claim is concerned, such remedies have been fully exhausted, under the strictest requirements of international law; and that so far as the contract debt is concerned, that the case having always been a matter of diplomatic negotiation between the Governments of the United States and Chile, the question does not upon this point enter into the discussion.

It has been also clearly set out that the rights possessed by Alsop & Co. were private, vested rights, and as such entitled to the recognition and protection of the Government of Chile; and, further, that since that Government had failed properly to recognize and protect such rights, it is under obligation to pay to the United States for and in behalf of the American claimants those sums due under the contract to the claimants by reason of this failure of the Government of Chile.

It has likewise been established, contrary to the contention of the Government of Chile, that the debt in this case was local and that the interference of the Government of Chile was wrongful and legally injurious.

And, finally, it has been demonstrated (1) that the Government of Chile entered into a diplomatic arrangement to pay the contract debt, certainly as early as 1892, and that it has frequently ratified such arrangement from that date until the present; (2) that under the treaty of 1904 the obligation of Chile to meet the contract debt was complete and unlimited, as was shown by the so-called "secret" notes, which the Government of Chile admits have the

effect of freeing Bolivia from all liability, which latter has been the understanding and contention of Bolivia from the time of the negotiation of the treaty until the present.

Inasmuch as these in their negative form are the principal points relied upon by the Government of Chile in its Case to establish its fundamental contention that it is not liable fully to meet the obligations imposed by the Wheelwright contract, it is submitted that His Majesty should make the award prayed for by the Government of the United States.

In this connection it will be recalled that the Government of the United States contended in its Case, first, that the Wheelwright contract of 1876 was a legal and binding instrument, negotiated by those having authority and recognized as valid by the Governments both of Bolivia and Chile (Case of the United States, Point I); that under this contract, thus legal and binding in all its parts, the concessionaries had certain vested rights, titles, and interests in the government estacas located in the Bolivian Littoral, which rights, titles, and interests the Government of Chile failed to recognize and protect, the claimants suffering thereby, and as a result thereof, damages in the sum of $508,538.14 (Case of the United States, Point II, pp. 111–120, and Point IV, pp. 339–344); that this contract also recognized as due the concessionaries a debt of 835,000 bolivianos, with interest at 5 per cent, and that the Government of Chile by reason (1) of her appropriation of the Arica customs, which had been set apart and allocated for payment of the debt, (2) of her repeated promises and treaty undertakings with the Government of Bolivia, and (3) of her repeated diplomatic undertakings to the Government of the United States, had become obligated to meet such indebtedness in full, principal and interest, such sum amounting now to $2,294,832.22 (Case of the United States, Point III, pp. 232–314; Point IV, p. 345); thus making an aggregate due from the Government of Chile, on both tort and contract sides of the claim, of $2,803,370.36. (Case of the United States, p. 347.) To this sum the Government of the United States contends there should be added such extra allowance for legal expenses incurred by the claimants in the prosecution of this claim since 1885 as might seem to His Majesty reasonable and just. And on this last item of the claim, in addition to the authorities heretofore cited, His Majesty's attention is most respectfully invited to the very recent decision of the Tribunal constituted at The Hague for the settlement of the case of the Orinoco Steamship Company in which the three judges made an

allowance of $7,000 for "the indemnification of counsel fees and expenses of litigation,"—being about 10 per cent of the total amount awarded.

In view of these facts and circumstances, and of the principles of law involved, it is submitted that the Government of the United States, for and in behalf of the individual claimants under the contract of December 26, 1876, is entitled to an award for the amounts hereinbefore stated and the Government of Chile is under all moral, equitable, and legal obligations to pay the same.

The Government of the United States therefore prays from His Britannic Majesty, acting as *amiable compositeur* in this case, an award in the sum of $2,803,370.36, United States gold, as of December 1, 1909, together with interest thereon at the rate of 6 per cent per annum until said award is paid, as well as such extra allowance for legal expenses incurred by the claimants in the prosecution of this claim since 1885 as may seem to His Majesty reasonable and just.